(23)

No. 06-593
Title: Long Island Care at Home, Ltd., et al., Petitioners
v.
Evelyn Coke
Docketed: October 30, 2006
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (03-7666)
Decision Date: August 31, 2006
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 26 2006	Petition for a writ of certiorari filed. (Response due November 29, 2006)
Nov 17 2006	Order extending time to file response to petition to and including December 15, 2006.
Dec 5 2006	Brief amici curiae of City of New York and New York State Association of Counties filed.
Dec 13 2006	Brief amicus curiae of National Association for Home Care & Hospice, Inc. filed.
Dec 15 2006	Brief amicus curiae of Continuing Care Leadership Coalition, Inc. filed.
Dec 15 2006	Brief of respondent Evelyn Coke in opposition filed.
Dec 15 2006	Brief amicus curiae of Home Care Council of New York City, Inc. filed.
Dec 15 2006	Brief amicus curiae of New York State Association of Health Care Providers, Inc. filed.
Dec 15 2006	Brief amicus curiae of Home Care Association of New York State, Inc. filed.
Dec 20 2006	DISTRIBUTED for Conference of January 5, 2007.
Dec 21 2006	Reply of petitioners Long Island Care at Home, Ltd., et al. filed. (Distributed)
Jan 5 2007	Petition GRANTED.
Feb 1 2007	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Feb 2 2007	Blanket consent to the filing of amicus briefs in support of either party or neither party received from counsel for the respondent.
Feb 5 2007	SET FOR ARGUMENT ON Monday, April 16, 2007.
Feb 8 2007	Brief amici curiae of City of New York and New York State Association of Counties filed.
Feb 16 2007	Brief amicus curiae of National Private Duty Association filed.
Feb 20 2007	Joint appendix filed.
Feb 20 2007	Brief of petitioners Long Island Care at Home, Ltd., et al. filed.
Feb 20 2007	Brief amici curiae of Continuing Care Leadership Coalition, Inc., et al. filed.
Feb 20 2007	Brief amicus curiae of National Association for Home Care & Hospice, Inc. filed.
Feb 20 2007	Brief amicus curiae of United States filed.
Mar 5 2007	Record received from U.S.D.C. Eastern District of New York. (1 box)
Mar 9 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 14 2007	Record received from U.S.C.A. for 2nd Circuit. (1 box)
Mar 16 2007	CIRCULATED.
Mar 27 2007	Brief amici curiae of AARP and The Older Women filed. (Distributed)
Mar 27 2007	Brief of respondent Evelyn Coke filed. (Distributed)

Mar 27 2007	Brief amici curiae of Urban Justice Center, et al. filed. (Distributed)
Mar 27 2007	Brief amici curiae of Alliance for Retired Americans, et al. filed. (Distributed)
Mar 27 2007	Brief amici curiae of Law Professors and Historians filed. (Distributed)
Apr 2 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 6 2007	Reply of petitioners Long Island Care at Home, Ltd., et al. filed.
Apr 10 2007	Letter from counsel for respondent received. (Distributed)
Apr 16 2007	Argued. For petitioners: H. Bartow Farr, Washington, D.C.; and David B. Salmons, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Harold C. Becker, Chicago, Ill.

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No. 06-__ 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in refusing to give deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to a thirty-year-old Department of Labor regulation—a regulation that has twice been upheld by the Tenth Circuit—on the ground that, even though it was promulgated under express grants of legislative authority and after full notice-and-comment rulemaking, the regulation was contained in a subpart headed "Interpretations."

2. Whether, in holding that a longstanding Department of Labor regulation was not persuasive and thus undeserving of any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Second Circuit erred by failing to address the governing provisions of the Fair Labor Standards Act and by declining to give any weight to the Department's interpretation of its own regulations.

RULE 29.6 STATEMENT

Petitioner Long Island Care at Home, Ltd. has no parent company, and there are no publicly held companies that hold any stock of Long Island Care at Home, Ltd.

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LONG ISLAND CARE AT HOME, LTD. AND
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Long Island Care at Home, Ltd. and Maryann Osborne respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-6a) is reported at 462 F.3d 48. The initial opinion of the court of appeals (Pet. App. 7a-32a) is reported at 376 F.3d 118. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 33a-48a) is reported at 267 F. Supp. 2d 332.

JURISDICTION

The judgment of the court of appeals on remand was entered on August 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the relevant regulations of the Department of Labor promulgated thereunder, 29 C.F.R. § 552.2 *et seq.*, are set forth at Pet. App. 65a-83a.

STATEMENT

This case involves a challenge to the validity of 29 C.F.R. § 552.109(a)—a regulation promulgated by the Department of Labor in 1975 after full notice-and-comment rulemaking—which declares that workers providing companionship services to the elderly and infirm are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act, *see* 29 U.S.C. § 213(a)(15) (providing exemption), even if they are employed by third parties rather than by the homeowner receiving care. Granting deference to the Department under the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the district court upheld the regulation. Pet. App. 33a-48a. The Second Circuit reversed, refusing to accord deference to the Department under either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7a-32a. After this Court vacated that decision, and remanded the case for consideration of further guidance provided by the Department, the Second Circuit adhered to its prior ruling and again held Section 552.109(a) to be unenforceable. Pet. App. 1a-6a.

A. The Statutory and Regulatory Framework

The issues in this case arise under certain provisions of the 1974 Amendments to the Fair Labor Standards Act (the

"Act"). *See* Pub. L. 93-259, 88 Stat. 55. Prior to the Amendments, workers were typically entitled to receive a specified minimum wage and enhanced pay for overtime only if they were employed by an "enterprise engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. §§ 206(a), 207(a). *See generally National League of Cities v. Usery*, 426 U.S. 833, 837-38 (1976); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 295 n.8 (1985). At that time, the Act defined such an enterprise as an enterprise that, among other things, had annual gross sales of at least $250,000. *See* 29 U.S.C. § 203(s)(1) (1976). The annual limit has since been doubled to $500,000. *See* 29 U.S.C. § 203(s)(1)(A)(ii).

In 1974 Congress broadened the Act to provide coverage for a particular class of workers: "Employees in domestic service." Unlike earlier provisions of the Act, the new Amendments defined the scope of coverage for domestic service workers primarily on the basis of the kind of work that they performed. Thus, Section 206(f) required payment of a minimum wage to "[a]ny employee—(1) who in any workweek is employed in domestic service in a household [if the employee's compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households, and (B) is so employed for more than 8 hours in the aggregate . . . ." 29 U.S.C. § 206(f). Similarly, Section 207(*l*) mandated enhanced overtime pay for "any employee in domestic service in one or more households [who is employed] for a workweek longer than forty hours . . . ." 29 U.S.C. § 207(*l*). *See also* H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2845 ("[i]t is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service").

Congress provided exemptions from coverage, however, for domestic service workers performing two specified jobs:

casual babysitting and companionship for the elderly and infirm. Section 213(a)(15) of the Act provides that the minimum wage and overtime provisions will not apply to "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). The Act thus gave to the Department, in express terms, the authority to promulgate legislative rules to define and delimit the exemption provided by Section 213(a)(15). In addition, Congress conferred a general grant of rulemaking authority in the 1974 Amendments, stating that "the Secretary is authorized to prescribe necessary rules, regulations, and orders with respect to the amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76.

Pursuant to both of these express delegations of authority, *see* 40 Fed. Reg. 7405 (1975), the Department initiated a notice-and-comment rulemaking, which resulted in regulations subsequently published in the Code of Federal Regulations. *See* 29 C.F.R. §§ 516.34, 552.1-552.7, 552.101-552.110. The critical regulation for present purposes is Section 552.109(a), contained in a subpart headed "Interpretations," which declares that "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 40 Fed. Reg. 7407. Although the original proposed regulation had not exempted workers providing companionship services "if the third party employer is a covered enterprise," 39 Fed. Reg. 35,385 (1974)—based on the premise that the Amendments did not intend to exempt "previously covered domestic service employees" (*id.* at 35,395)—the Department altered its course upon further

consideration. Explaining the change, the Department noted that the language of the exemption in the Act did not exclude third party employers but applied "to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. 7405. The Department concluded that the final regulation was "more consistent with the statutory language and prior practices concerning similarly worded exemptions." *Id.*

At the same time that the Department promulgated Section 552.109(a), it promulgated another regulation, 29 C.F.R. § 552.3, which purported to define the term "domestic service employment." That regulation, contained in a subpart entitled "General Regulations," states that "[a]s used in section 13(a)(15) of the Act, the term 'domestic service employment' refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." The regulation then goes on to provide an "illustrative and not exhaustive" list of the kinds of work considered to be "domestic service employment." 40 Fed. Reg. 7405. As explained in the regulation, that work includes services by employees such as "cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use." *Id.*

Section 552.109(a) has remained in force for more than 30 years. The Department has periodically proposed eliminating the exemption for employees of third party employers, *see* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5485, 5488 (2001), but, following various periods of comment, has invariably chosen not to do so. The most recent of these efforts took place five years ago when the Department, positing "an internal inconsistency" between Sections 552.109(a) and 552.3, sought to resolve it by limiting the exemption to workers employed by the person receiving care. *See* 66 Fed. Reg. 5485-86. The Department ultimately

withdrew the proposed change, however, after numerous commentators stressed the severe economic impact that would result. *See* 67 Fed. Reg. 16,668 (2002).

B. This Litigation

1. Respondent, a worker employed by petitioner Long Island Care at Home, Ltd. to provide companionship services, brought this "test case" (Pet. App. 9a) challenging the application of Section 552.109(a) to workers employed by persons or entities other than the homeowners receiving care.[1] Finding that the regulation was entitled to "strong deference" under *Chevron*, 467 U.S. at 844, *see* Pet. App. 46a, and pointing to the "explicit grant of authority to the [Department of Labor] to define and delimit Section 213(a)(15)," as well as "the fact that these regulations have been in effect for over twenty-eight years," Pet. App. 46a, the district court held that Section 552.109(a) was a legitimate exercise of the Depart-ment's authority. Pet. App. 46a.

The Second Circuit reversed. Proceeding on the basis that "[b]ecause the [Fair Labor Standards Act] is a remedial act, its exemptions are to be narrowly construed," Pet. App. 10a (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)), the court refused to accord *Chevron* deference to Section 552.109(a), deeming it "an interpretive rather than a legislative regulation." Pet. App. 26a. Although the court of appeals acknowledged that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," Pet. App. 26a (quoting *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993)), it held that the regulation did not merit *Chevron* deference under the test set out in *United States v. Mead Corp.*, 533 U.S. 218,

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[1] Respondent also challenged the validity of 29 C.F.R. § 552.6, which defines the term "companionship services." The Second Circuit upheld Section 552.6, *see* Pet. App. 15a-22a, and it is not at issue in this petition.

226-27 (2001), because the Department "did not intend to use the legislative power delegated in [29 U.S.C.] § 213(a)(15) when it promulgated § 552.109(a)." Pet. App. 26a.[2] It found that lack of intention to be "most apparent from its inclusion of the regulation under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations.'" Pet. App. 26a.[3] It thus concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a.

The Second Circuit then went on to reject the argument, made by the Department of Labor in an *amicus* brief, that Section 552.109(a) warranted deference as a legislative rule under *Chevron* because it had been "promulgated after notice and comment . . . ." Pet. App. 27a. Although the court recognized that "*Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference," Pet. App. 27a (citing *Mead*, 533 U.S. at 230-31), it found no need to do so for a regulation that it had already classified as an "interpretive rule." Based on that characterization of Section 552.109(a), the Second Circuit dismissed the importance of the notice-and-comment procedure by saying that "the agency undertook a notice and comment procedure for an interpretive

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[2] The Court in *Mead* held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27.

[3] The Second Circuit found additional support in the Secretary's statement that "[t]he definitions required by section 213(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c); *see* Pet. App. 26a.

regulation despite the fact that the procedure was not required." Pet. App. 27a.[4]

The Second Circuit also declined to give deference to Section 552.109(a) under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Addressing "Congressional purpose," the court, without reviewing any statutory language, took the view that "persons who were employed by a third party were outside the category of 'domestic service employees' and were protected by the [Act] before the 1974 amendments," Pet. App. 29a (citations omitted), and that "[i]t is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered." Pet. App. 30a. The court of appeals also placed considerable weight on what it regarded as a "stark internal inconsistency" between Section 552.3 (the regulation defining "domestic service employment") and Section 552.109(a), Pet. App. 30a, finding that "[p]lainly, under § 552.3, employees employed by third parties do not qualify for the exemption" that Section 552.109(a) grants to them. Pet. App. 30a. Finally, the court pointed to the fact that the Department had proposed elimination of the exemption for third party employees on several occasions, deeming its position "hardly . . . a model of consistency," Pet. App. 30a, and questioning both the Department's reasoning and procedural regularity in adopting Section 552.109(a) in the first place. *See* Pet. App. 30a-31a.

2. Petitioners filed a petition for certiorari, raising, among other issues, the failure of the Second Circuit to accord *Chevron* deference to the regulation, and emphasizing the

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[4] The Second Circuit recognized that the Tenth Circuit, affording *Chevron* deference, had upheld the validity of Section 552.109(a). *See* Pet. App. 25a (citing *Johnston v. Volunteers of America, Inc.*, 213 F.2d 559, 562 (2000), *cert. denied*, 532 U.S. 1072 (2001)). Saying that *Johnston* had been decided before *Mead*, the Second Circuit declined to follow it. *See* Pet. App. 25a.

substantial harm likely to be caused by its invalidation. *See* Petition for A Writ of Certiorari, No. 04-1315. Submitting a brief by invitation, the United States stated that the decision of the Second Circuit was contrary to several decisions of this Court (including *Mead* and *Auer v. Robbins*, 519 U.S. 452 (1997)) and conflicted with decisions of the Tenth Circuit (*Johnston* and *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004)). U.S. Br. at 9, 15. The United States also argued that the decision was "inconsistent with the plain terms of the FLSA, which strongly support the construction adopted by DOL in Section 552.109(a)," and, as evidenced by the *amicus* briefs filed in support of the petition, "will have a significant and disruptive impact on the provision of government-funded home care to elderly and disabled individuals." *Id.* It informed the Court that "[f]or those reasons, and because of the important and recurring nature of the questions raised in the case, it would be appropriate for this Court to grant the petition for a writ of certiorari to review the [deference question]." *Id.* However, noting that the Department of Labor had recently offered "authoritative agency guidance" making clear that it intended "Section 552.109(a) to be an exercise of its expressly delegated legislative authority," *id.* (citing Wage and Hour Advisory Memorandum No. 2005-1), the Solicitor General recommended that the Court vacate the judgment and remand the case to the Second Circuit for consideration of the Department's position. *See* U.S. Br. at 9-10.[5] The Court then granted the petition, vacated the judgment, and remanded the case "for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005)." 126 S. Ct. 1189 (2006).

On remand, the Second Circuit adhered to its original rulings. With respect to *Chevron* deference, it again concluded,

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[5] The Advisory Memorandum, reprinted at Pet. App. 50a-64a, also set forth guidance regarding the proper reading of Section 552.3. *See* Pet. App. 54a-63a.

"for substantially the same reasons," that "§ 552.109(a) was not intended, at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule." Pet. App. 3a. Finding "arguments to the contrary presented in the DOL Memo" to be "not persuasive," Pet. App. 3a, it said that, even if the Department regarded Section 552.109(a) as "legally binding," Pet. App. 3a, the regulation "could have been simply intended to provide guidance to DOL employees as to how the agency planned to interpret 'domestic service employment' in the third-party employer context." Pet. App. 4a. The court of appeals also declined, once again, to give *Skidmore* deference to the regulation, relying in particular on its view about the inconsistency between Section 552.109(a) and Section 552.3. In doing so, the Second Circuit rejected the Department's explanation of why the two provisions could be read harmoniously, saying that it "need not defer to an agency's interpretation of its own regulations when those regulations, like § 552.109(a) and §552.3, are unambiguous." Pet. App. 5a (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). It thus declared Section 552.109(a) unenforceable. Pet. App. 6a.[6]

REASONS FOR GRANTING THE WRIT

The Second Circuit has twice struck down a Department of Labor regulation—promulgated more than 30 years ago after notice-and-comment rulemaking and adhered to ever since—that exempts certain third party employees from coverage under the Fair Labor Standards Act, *see* 29 U.S.C. § 213(a)(15), holding that the regulation is merely a nonbinding interpretation lacking the force of law and that it is unpersuasive. *See* Pet. App. 23a-32a (invalidating 29 C.F.R. § 552.109(a)); *id.* at 1a-6a (same). Following the initial decision, petitioners sought review in this Court on the grounds,

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[6] As it had done after its initial decision, the Second Circuit stayed the mandate pending the filing of a Petition for a Writ of Certiorari in this Court. *See* Pet. App. 49a .

among others, that the Second Circuit had failed to accord the regulation proper deference under the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); that the decision was in conflict with a decision of the Tenth Circuit, *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2000); that the Second Circuit had misread the statute and other relevant regulations; and that the invalidation of Section 522.109(a) would cause extraordinary and unjustified harm. The United States informed the Court that "it would be appropriate for the Court to grant the petition for certiorari," U.S. Br. at 9, but, noting that the Department of Labor had recently issued new "authoritative agency guidance" (*id.*), urged the Court to vacate and remand so that the Second Circuit could consider that guidance. The Court followed that course. *See Long Island Care at Home, Ltd. v. Coke*, 126 S. Ct. 1189 (2006). On remand, however, the Second Circuit again declared Section 552.109(a) to be unenforceable.

The decisions below now merit full review by this Court. To begin with, the result alone—overturning a thirty-year-old regulation twice upheld by another Circuit (*see Johnston* and *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004))—is sufficient to justify this Court's attention. Not only does the Second Circuit's disregard of agency authority disrupt long-standing wage-and-hour practices, it threatens to do so at potentially enormous cost. Only last Term numerous *amici curiae* informed the Court that the increased expense resulting from invalidation of Section 552.109(a) would erode their ability to provide appropriate care for the elderly and infirm, a problem that the United States specifically noted in its brief supporting review. *See* U.S. Br. at 9. Those concerns are no less compelling today.

The Second Circuit decisions are troubling for other reasons as well. The court of appeals' principal rationale for withholding *Chevron* deference—that Section 552.109(a) was in a subpart entitled "Interpretations"—not only wrongly

assumes that an agency interpretation can never have the force of law, *see United States v. Mead Corp.*, 533 U.S. 218, 227 (2001), but is flatly inconsistent with this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), giving *Chevron* deference to a different Department of Labor regulation contained in an identically labeled subsection. Moreover, by refusing to give *Chevron* deference to a regulation that was issued after notice-and-comment rulemaking and that bears other significant indicia of deliberate lawmaking, the court of appeals has seriously diminished the proper respect due to "relatively formal" agency action. *See Mead*, 533 U.S. at 230. While this Court has not finally resolved whether resort to notice-and-comment rulemaking is sufficient in and of itself to earn *Chevron* deference—compare *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 125 S. Ct. 2688, 2712-13 (2005) (Breyer, J., concurring) with *id.* at 2717-18 (Scalia, J., dissenting)—the federal courts of appeals, following the standard set forth in *Mead*, 530 U.S. at 226-27, have repeatedly emphasized the importance of notice-and-comment rulemaking in affording deference under *Chevron*. *See, e.g.*, *Whitaker v. Thompson*, 353 F.3d 947, 950 (D.C. Cir. 2004); *White v. Scibana*, 390 F.3d 997, 1000 (7th Cir. 2004); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179 (11th Cir. 2003).

The Second Circuit also went astray in failing to accord even the lesser deference warranted by the doctrine of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 234-35. Although the court of appeals, relying primarily on another regulation promulgated by the Department, 29 C.F.R. § 552.3, ultimately found that domestic workers employed by third parties are not "employees employed in domestic service employment," 29 U.S.C. § 213(a)(15), and thus cannot be exempted under that section, a proper reading of the Act as a whole shows that reading to be incorrect. In fact, Congress used the critical coverage term "employee[s] in domestic service" to broadly encompass

workers performing domestic jobs regardless of the workers' employer—assuring that the coverage provisions of the Act would apply to domestic service employees across the board—and the exemption for those particular domestic service employees providing "companionship services" also applies regardless of the workers' employer, just as the Department has determined. Moreover, insofar as the Second Circuit supported its contrary view with a reading of Section 552.3 that is at odds with the Department's own reading of that regulation, the court flouted the well-established principle that an agency interpretation of its own regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Thus, at each possible step, the court of appeals wrongly substituted its view for the judgment of the agency charged with implementing the governing statute. That judicial usurpation should not be allowed to stand.

I. THE SECOND CIRCUIT DECISIONS, BY INVALIDATING A REGULATION TWICE UPHELD BY THE TENTH CIRCUIT, DISRUPT LONGSTANDING PRACTICES AND THREATEN A SERIOUS DISLOCATION OF CARE

The Second Circuit, in declaring Section 552.109(a) to be nothing more than an unenforceable "interpretation," rather than a rule of law, Pet. App. 26a, has ordered a dramatic reversal in wage-and-hour practices that have been in effect, without change, for more than 30 years. Ever since promulgation of the regulation in 1975, the governing rule has been that, in keeping with the congressional intent to make companionship services affordable for the elderly and infirm, *see* Pet. App. 46a-47a, employers of workers providing those services are not required to pay the minimum wage or time-and-a-half wages for overtime. Importantly for present pur-

poses, that rule has applied regardless of whether the employee was hired directly by the person receiving care or was employed by a third party such as a family member or an independent agency. Indeed, the exemption for employees of third parties has become so firmly established that, when the Department recently proposed eliminating it, it was forced to pull back because of concerns about the potential adverse economic effects. *See* 67 Fed. Reg. 16,668 (2002). By judicial fiat, however, the Second Circuit has done precisely what the agency, only a few years before, ultimately found it inadvisable to do.

Quite apart from its overriding of the Department of Labor, the Second Circuit has also put itself into direct conflict with the Tenth Circuit, *see Johnston*, 213 F.3d at 561-62; *Welding*, 353 F.3d at 1217 n.3, creating a checkered regulatory scheme in which Section 552.109(a) is controlling in some states but not others. In *Johnston*, decided just six years ago, the Tenth Circuit expressly rejected the argument that Section 552.109(a) was merely an "interpretation which does not have the effect of law . . . ." 213 F.3d at 561. Applying *Chevron*, *see* 213 F.3d at 562, the court of appeals determined "that the secretary's interpretation is not arbitrary, capricious, or manifestly contrary to § 213(a)(15)." 213 F.3d at 562. Unlike the Second Circuit, therefore, the Tenth Circuit held that "the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." 213 F.3d at 562.

This disagreement between the Second and Tenth Circuits shows no signs of abating. In its initial decision below, the Second Circuit openly declined to follow *Johnston*, pointing out that the Tenth Circuit had decided that case before this Court's decision in *Mead*. *See* Pet. App. 25a. However, the Tenth Circuit also handed down a decision after *Mead*, *see Welding*, 353 F.3d 1214, specifically relying on *Johnston* and reiterating that "[t]he domestic service employee need not be

employed directly by the person receiving the services or by that person's family for the exemption to apply." 353 F.3d at 1217 n.3; *see also id.* ("[t]he exemption can apply even when the domestic service employee is actually employed by a service agency . . . ."). The views of the Tenth Circuit thus are solidly behind the validity of Section 552.109(a). By contrast, given an opportunity to reconsider its views upon remand from this Court, the Second Circuit firmly held to its earlier position, again declaring that Section 552.109(a) was unenforceable.

The practical consequences of the Second Circuit's decisions are potentially enormous. At the petition stage last Term, the City of New York told the Court that invalidation of Section 552.109(a) would add nearly $300 million annually to its costs of providing home care to the elderly and infirm. *See* City of New York, et al. Amici Br. at 2, 5-8. Other home care providers declared that they would simply be unable to bear the sharply increased costs resulting from the decision below. *See, e.g.*, Home Care Ass'n of New York State, Inc. Amicus Br. at 2, 9-10. Faced with this new burden, therefore, many providers may be forced to significantly reduce their employees' workweeks in order to avoid incurring ruinous time-and-a-half overtime obligations. *See* Pet. App. 85a (Declaration of Maryann Osborne).

These measures will almost certainly cause severe disruptions for clients needing care. Most seriously, the clients will face a sharp drop in the continuity and stability of their care, with more caregivers being required in order to provide clients with the same or even fewer services. Given the highly personal nature of companionship services, "clients often are very unwilling to enter into such a relationship with more than one or two such individuals." Pet. App. 100a (Declaration of Susan Choi-Hausman). Moreover, a shifting array of personal caregivers "assaults the dignity of patients, undermines the quality of care that they receive, and is there-

fore detrimental to their well being." Pet. App. 86a (Declaration of Maryann Osborne). This problem will only get worse as the number of elderly needing care continues to grow. Yet, it is precisely those people likely to be harmed by the new judicially imposed regime—"individuals who (because of age or infirmity) are unable to care for themselves" (29 U.S.C. § 213(a)(15))—that Congress specifically meant to help by exempting personal companions from the coverage provisions of the Act. *See id.*

This upheaval is as unnecessary as it is problematic. The Secretary correctly determined thirty years ago that the minimum wage and overtime provisions should not apply to caregivers employed by third parties. The Second Circuit's decisions to the contrary warrant review.

II. THE DECISIONS BELOW WRONGLY FAIL TO GIVE *CHEVRON* DEFERENCE TO A REGULATION PROMULGATED UNDER EXPRESS DELEGATIONS OF LAWMAKING AUTHORITY AND AFTER NOTICE-AND-COMMENT RULEMAKING

The reasoning used by the Second Circuit to invalidate Section 552.109(a) also raises serious concerns. While the court was wrong not to give even *Skidmore* deference to the regulation, *see* pages 23-30 *infra,* it committed its first, and most striking, error by holding that Section 552.109(a)—a regulation promulgated by the Department of Labor under express grants of lawmaking authority and after full notice-and-comment rulemaking—did not have the "force of law" required for deference under *Chevron*. *See Mead*, 533 U.S. at 226-27 (agency implementation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *Gonzales v. Oregon*, 546 U.S. ___, 126 S. Ct. 904, 914-15 (2006) (same). Accord-

ing to the Second Circuit, the regulation did not merit *Chevron* deference because the Department had put the regulation "under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations,'" Pet. App. 26a, and had stated that "'the definitions required by § 213(a)(15) [of Title 29] are contained in [29 C.F.R.] §§ 552.3, 552.4, 552.5 and 552.6 [of Subpart A].'" Pet. App. 26a. It thus concluded that the Department had failed to satisfy the second part of the *Mead* standard "because, by the DOL's own account, [the regulation] was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a .

There are several notable flaws in this analysis. First of all, the Second Circuit is simply mistaken in supposing that a rule labeled an "interpretation" is not, and never can be, a rule with the force of law. On the contrary, numerous regulations with the force of law effectively "interpret" the governing statute in the sense that they supply additional legal content to statutory provisions that require further detail. *See generally Chevron*, 467 U.S. at 843 (discussing agency authority "to elucidate a specific provision of the statute by regulation"). Indeed, the Court in *Mead* acknowledged that interpretations can have the force of law, expressly declaring that *Chevron* deference is warranted when "the agency *interpretation* claiming deference was promulgated in the exercise of [delegated lawmaking] authority." *Mead*, 533 U.S. at 227 (emphasis added); *see also Gonzales*, 126 S. Ct. at 914 ("[A]n interpretation of an ambiguous statute may also receive substantial deference") (citing *Chevron*); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The proper question, then, is not whether an agency regulation "interprets" a statute, but whether the regulation does so only as a matter of agency guidance or whether it is meant to declare enforceable legal rights and responsibilities. Although the task of distinuishing between the two is not always easy, *see Lincoln v. Vigil*, 508 U.S. 182, 196 (1993), the labeling of a regulation as

an "interpretation" does not, by itself, consign it to the former category.

The Second Circuit's decision to the contrary, in fact, is directly at odds with this Court's decision in *Auer v. Robbins*, 519 U.S. 542 (1997). In *Auer*, the Court upheld a Department of Labor regulation interpreting the term "bona fide executive, administrative, or professional capacity" for purposes of implementing a different exemption under the Fair Labor Standards Act. *See* 29 U.S.C. § 213(a)(1). At that time, the regulation at issue in *Auer*, like Section 552.109(a) here, was set forth in a Subpart B headed "Interpretations" instead of in Subpart A. *See* 29 C.F.R. 541.118(a) (1996). This Court held that it was entitled to full deference under *Chevron*. *See* 519 U.S. at 455-56.

Rather than focusing almost exclusively on the label attached to the regulation, the Second Circuit should have paid more attention to affirmative evidence that the Department was exercising its lawmaking authority, in particular the fact that the agency engaged in notice-and-comment rulemaking. This Court has indicated that congressional authorization of notice-and-comment rulemaking typically satisfies the first part of the *Mead* formulation, saying that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230; *see also id.* at 229 (authorization of rulemaking is "a very good indicator of delegation meriting *Chevron* treatment"); *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36, 45 (2002). Given that assumption, it is reasonable also to assume that an agency regulation actually resulting from that "process of rulemaking" will satisfy the second part of the *Mead* formulation, demonstrating that the agency was indeed making law. To date, this Court has not directly addressed whether agency resort to

notice-and-comment rulemaking is itself sufficient, or at least presumptively sufficient, to establish that a regulation has the force of law, although individual Justices have expressed preliminary views on this question. *See National Cable & Telecomm. Ass'n*, 125 S. Ct. at 2712-13 (Breyer, J., concurring) (formal proceeding not always "a sufficient condition [for use of *Chevron*]"); *id.* at 2717-18 (Scalia, J., dissenting) (under *Mead* "some unspecified degree of formal process was required—or was at least the only safe harbor").[7]

For their part, however, numerous federal courts of appeals have emphasized that use of notice-and-comment rulemaking is a strong, even dispositive, indication that an agency is exercising its delegated lawmaking power. *See Whitaker*, 353 F.3d at 950; *White*, 390 F.3d at 1000; *Shotz*, 344 F.3d at 1179; *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 n.6 (1st Cir. 2005); *Koyo Seiko Co., Ltd. v. United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001); *Alaska Dept. of Health and Social Services v. Centers for Medicare and Medicaid Services*, 424 F.3d 931, 939 (9th Cir. 2005). In *Whitaker*, for example, the D.C. Circuit stated that "[b]ecause we are reviewing an agency's interpretation of the statute it is entrusted to administer, and the agency reached its interpretation after a relatively formal process with public notice and comment . . . , we review under the familiar framework established by [*Chevron*]." 353 F.3d at 950. Similarly, the Federal Circuit, reviewing an agency rule, noted that the methodology set forth in the rule "was adopted after notice-and-comment rulemaking, and thus is entitled to maximum deference." *Koyo Seiko*, 258 F.3d at 1347. And, the First Circuit rejected an argument that a Bureau of Prisons rule was entitled to nothing more than *Skidmore* deference, remarking that, because the interpretation was embodied in a regulation "which

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[7] The Court has made clear that notice-and-comment rulemaking is not *necessary* for a regulation to receive *Chevron* deference. *See Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002); *Mead*, 533 U.S. at 231.

was adopted pursuant to the notice-and-comment procedure of the Administrative Procedure Act," *Perez-Olivo*, 394 F.3d at 53 n.6, it was "[t]hus . . . entitled to full deference under *Chevron*." *Id.; see* 5 U.S.C. § 553(b)(A) (notice-and-comment rulemaking not required for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

The court of appeals below dismissed the fact that the Department had promulgated the regulation after relatively formal rulemaking, saying that "the agency undertook a notice and comment procedure for an interpretive regulation despite the fact that the procedure was not required." Pet. App. 27a; *see also* Pet. App. 27a ("following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what it did; it does not alter the fact that the agency did not act pursuant to legislative authority"). But that approach gets things backwards. Rather than looking to the notice-and-comment procedure as a compelling indication that the Department had invoked its lawmaking authority, as other Circuits have done, the Second Circuit simply ignored it in deciding the critical issue—whether the regulation had the force of law or was merely interpretive—and then, once it finally turned to it, gave the procedure short shrift by treating it as unnecessary for what the Court had already deemed an interpretive rule. This cart-before-the-horse analysis necessarily undervalues the force of a promulgated regulation because, contrary to what the Second Circuit apparently believed, use of the notice-and-comment procedure *does* demonstrate that an agency meant to "act pursuant to legislative authority." Pet. App. 27a. It thus can be an integral part of the inquiry into whether a rule has the force of law, not just an afterthought once the essential analysis has been completed.[8]

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[8] A rule promulgated following notice and comment may still be invalid, of course, if it fails the *first* part of the *Mead* test. *See, e.g., Motion*

To compound its error, the court then mostly ignored other strong indications that Section 552.109(a) is a legislative rule. Thus, it gave no weight to the fact that the Department, in promulgating the 1975 regulations, expressly relied on both the delegation of authority in 29 U.S.C. § 213(a)(15) to "define and delimit" the terms of that provision and the general rulemaking authority conferred by Section 29(b) of the 1974 Amendments, granting the Department the power "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76. Yet, the explicit reliance on those grants of authority, coupled with publication of the regulation in the Code of Federal Regulations, is itself telling evidence that the Department intended Section 552.109(a) to have the force of law. *See American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).[9] And the very nature of the rule supports that view: by dictating who is required to pay, and who is entitled to receive, minimum wage and overtime pay, Section 552.109(a) directly "affects individual rights and obligations," *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979), as legislative rules do. *See id.*

Finally, the court of appeals erred by refusing to credit the Department's own representation that, in promulgating Sec-

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Picture Ass'n of America, Inc. v. FCC, 309 F.3d 796 (D.C. Cir. 2002). An agency cannot claim authority that Congress did not delegate just by engaging in notice-and-comment rulemaking. In this case, however, the Act unmistakably grants the Department the authority to promulgate legislative rules. *See* 29 U.S.C. § 213(a)(15); 1974 Amendments, § 29(b), 88 Stat. 76.

[9] This evidence is not undercut by the statement that "[t]he definitions required by Section 213(a)(15) are contained in §§ 552.3, 552.4, 552.5, and 552.6." 29 C.F.R. § 552.2(c). Even leaving aside that the Department was exercising its general Section 29(b) rulemaking authority as well as the more specific Section 213(a)(15) authority, the statement in Section 552.2(c) simply reflects that the regulations, as a whole, embody not just "definitions," but additional substantive provisions specifying how the Act, including the "definitions," is to operate.

tion 552.109(a), it had intended to, and did, exercise its lawmaking power. *See* Pet. App. 3a-4a. The December 2005 Advisory Memorandum, directly contradicting the Second Circuit, stated in plain terms that "the Department considers the third party employment regulations at 29 C.F.R. § 552.109 to be authoritative and legally binding." Pet. App. 63a. The Department pointed to specific language in the final 1975 notice to demonstrate that "at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule." Pet. App. 63a-64a. It thus reiterated that "the Department has always treated the third party employment regulations as legally binding legislative rules . . . ." Pet. App. 64a.

The Second Circuit should have paid more heed to these views. Although an agency's characterization of its own actions is not dispositive, *see, e.g., Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), several federal courts of appeals have held that the agency characterization carries at least some force, even when the agency is arguing that its rule was merely a matter of internal policy and thus not subject to formal rulemaking. *See, e.g., American Airlines, Inc. v. Dept. of Transportation*, 202 F.3d 788, 797 (5th Cir. 2000) ("significant deference to an agency's characterization of its own action"); *Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2000) ("a factor [to] consider") (internal quotation marks omitted). The case for deference is stronger still when, as here, the agency has actually gone through the process of notice-and-comment rulemaking and seeks only to have its rule treated as law. *See generally Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517 (1994) ("Secretary was well within her discretion to interpret this language as imposing a substantive limitation . . . .") Here, the agency characterization is consistent with other historical evidence, and it accords with the agency's application of the regulation

over a long period of time. *See generally Barnhart*, 535 U.S. at 220 ("this Court will normally accord particular deference to an agency interpretation of 'longstanding' duration"). There was no good reason for the Second Circuit to disregard it.

III. THE DECISIONS BELOW, IN REFUSING TO ACCORD EVEN *SKIDMORE* DEFERENCE, CONTRAVENE THE PROVISIONS OF THE ACT AND IMPROPERLY DISREGARD THE DEPARTMENT'S INTERPRETATION OF ITS OWN REGULATIONS

Having found *Chevron* inapplicable, the Second Circuit went on to hold that the Department's interpretation did not merit any deference at all, even under *Skidmore*. *See* Pet. App. 29a-32a; 4a-6a. But this Court has observed that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . , and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . ." 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139) (internal citations omitted). Although it is not entirely clear what the limits of that deference might be, the Court in *Mead* suggested that reasonable agency views are entitled to "'at least some added persuasive force,'" 533 U.S. at 235 (quoting *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997)), or "some weight," 533 U.S. at 235 (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991)), or a "respect proportional to [their] 'power to persuade,'" 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). Thus, unless *Skidmore* deference is reduced to an empty circularity—that is, an agency interpretation warrants deference only to the extent that the court would adopt the same interpretation without giving deference—the views of an expert agency charged with administering a governing statute should at least tilt the balance with respect to unsettled

questions about the scope of proper implementation. Had the Second Circuit extended that deference here, it would have been required to uphold Section 552.109(a) as a well-grounded application of the 1974 Amendments.

The Second Circuit declined to do so, however, largely because it regarded Section 552.109(a) as inconsistent with another regulation promulgated by the Department to implement the 1974 Amendments: Section 552.3. As the court of appeals saw it, Section 552.3 had defined the term "domestic service employment" in a way that excluded domestic service performed by third party employees. *See* Pet. App. 30a; 29 C.F.R. § 552.3 (referring to "services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed"). Using this as a starting point, the Second Circuit reasoned that, because the statutory exemption for "companionship services" applied, by its terms, only to those services provided by "employee[s] employed in domestic service employment," 29 U.S.C. § 213(a)(15), the Department was barred by its own regulation from exempting workers employed by third parties. *See* Pet. App. 30a.

The most obvious shortcoming in this analysis is its lack of attention to the Act itself. Although any serious consideration of an interpretation's "persuasiveness" must look to the language of the governing statute—it is, after all, the statute that the agency is interpreting—the Second Circuit's discussion of the Act is both cursory and inaccurate. *See* Pet. App. 29a-30a; 4a-5a. Insofar as the Act is concerned, the court of appeals relies almost exclusively on the premise that domestic workers employed by third parties were already covered by the Act before 1974 and the idea that it is "implausible" to think that Congress would have intended to eliminate coverage for previously covered employees. *See* Pet. App. 29a-30a. But this off-hand treatment reflects a basic misunderstanding both of the Act's history and of the changes brought about by the 1974 Amendments.

Before the 1974 Amendments, workers in domestic service were subject to the minimum wage and overtime provisions of the Act only if they were employed by an "enterprise engaged in commerce or in the production of goods for commerce." See 29 U.S.C. §§ 206(a)(1); 207(*l*); *see generally National League of Cities*, 426 U.S. at 837-38; *Tony and Susan Alamo Foundation*, 471 U.S. at 295 n.8. As the law then stood, an employer did not fall within that definition unless it had annual gross sales of at least $250,000 (since raised to $500,000). 29 U.S.C. § 203(s)(1) (1976). Thus, contrary to the Second Circuit's understanding, domestic service workers employed by third parties were *not* routinely covered by the Act before 1974: they were covered if, but only if, they worked for an employer of a certain minimum size. And, of course, domestic service workers were not covered at all if they were employed by individual homeowners or by their families.

The 1974 Amendments significantly altered the Act with respect to domestic service workers, bringing them as a class within the scope of the minimum wage and overtime provisions. *See* 29 U.S.C. §§ 206(f); 207(*l*). Nothing in the language of the Amendments indicates that Congress meant the relevant provisions to apply only to workers employed by individual homeowners, rather than to all workers providing domestic services including those employed by third parties. Section 206(f), headed "Employees in domestic service," directs that the minimum wage be paid to "[a]ny employee—(1) who in any workweek is employed in domestic service in a household [if the employee's cash compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households; and (B) is so employed for more than 8 hours in the aggregate." That language is broad and inclusive, and the explicit mention of employees "employed . . . in one *or more* households," *see* 29 U.S.C. § 206(f) (emphasis added), naturally tends to bring within the category of

"[e]mployees in domestic service" those domestic service workers most likely to be employed by third parties such as employment agencies. That reading is reinforced by the language of the new overtime subsection, 29 U.S.C. § 207(*l*), which declares that "[n]o employer shall employ any employee in domestic service in *one or more* households," *id.* (emphasis added), without paying the required compensation. That terminology, too, strongly suggests that the provision extends to third party employers, which would commonly be the employer for domestic workers employed in more than one household.

This reading of Sections 206(f) and 207(*l*) not only fits with the text of those provisions, it eliminates inexplicable gaps in coverage that would result from an interpretation that treats "[e]mployees in domestic service" as excluding third party employees. As we have explained, the Act before 1974 did not cover domestic service workers—an open-ended category of workers that includes not just companions but cooks, chauffeurs, maids, nurses, housekeepers, and so forth —unless the worker was employed by a covered "enterprise." If the only workers regarded as "[e]mployees in domestic service" under the Amendments were workers employed by the individual homeowners receiving services, it would leave entirely outside the Act any worker employed by agencies too small to qualify as an "enterprise" and, seemingly, any worker employed by other third parties such as relatives of the homeowner. That would be a startling omission for a series of provisions that, subject to the prescribed exemptions, were meant "to include within the coverage of the Act all employees whose vocation is domestic service." H.R. Rep. No. 93-913, 1974 U.S.C.C.A.N. 2845.

If the coverage provisions of the Act apply to all domestic service workers including third party employees, it makes sense to think that the statutory exemption for domestic service workers providing "companionship services," 29 U.S.C. § 213(a)(15), applies to them as well. Again, there is nothing

in the language of the Act to show that Congress intended the availability of the exemption to turn on who employed the worker. The focus of the provision is not on the nature of the employer, but on the type of work that the employees perform: the exemption extends to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). That language ("any employee employed in domestic service employment") is once again broad and inclusive.

This straightforward reading of the exemption also fits with its self-evident purpose. As the district court below pointed out, Congress included the exemption "to allow those in need of [companionship] services to be able to find such assistance at a price they can afford." Pet. App. 46a. *See also Welding*, 353 F.3d at 1217 ("Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them"). This concern about affordable companionship services does not fluctuate depending upon whether the workers are employed directly by the homeowner or by a third party employer, or upon whether the workers were or were not previously covered by the Act. *See* Pet. App. 46a-47a. Indeed, the need to restrain costs in the case of third party employees has only become more acute as agencies provide an increasing amount of the needed care.[10]

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[10] The Second Circuit relied on the principle that exemptions to the Act "are to be narrowly construed." Pet. App. 10a. But that principle is largely inapposite here. While a narrow definition of "employee in domestic service" would have the effect of limiting the Section 213(a)(15) exemption for workers providing companionship, it would have the much greater threshold effect of limiting the *coverage* of Sections 206(f) and 207(*l*), which apply to the full range of domestic service workers. That

Having paid little heed to the Act, the Second Circuit rested much of its decision to invalidate the exemption for third party workers on its belief that the exemption was incompatible with the Department's regulatory definition of "domestic service employment" in Section 552.3. *See* Pet. App. 30a. The Department, however, has explained why this is not so. *See* Pet. App. 54a-63a. In its December 2005 Advisory Memorandum, the Department said that neither Section 552.3 nor Section 552.101(a)—a second regulation containing similar language—was intended to address the question of who employed the employee. *See* Pet. App. 55a-57a, 62a-63a. Rather, the purpose of those sections was only to specify what kind of work was required and where the work was to be performed: that is, domestic services in a private home (as opposed to, say, a boarding house). *See* Pet. App. 58a. The Department also carefully reviewed the origin of the "person by whom he or she is employed" language, Pet. App. 57a-59a, stressing that its use was not meant to exclude third party employees from the category of workers covered by the domestic service provisions of the Act. *See* Pet. App. 63a.

The Second Circuit, however, declined to give deference to the Department's reading of its regulations, *see* Pet. App. 5a, again committing a critical error. This Court has long recognized that an agency's interpretation of its own regulations "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson*, 508 U.S. at 45 (quoting *Bowles*, 325 U.S. at 414). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). As the Court has stated, the role of the judiciary is "not to decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512. Rather, a court must abide by any

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narrow reading, in turn, would offend the basic principle that a remedial act should be construed broadly. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999).

reasonable agency reading. *See id.*; *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001).

To justify its lack of deference, the Second Circuit invoked the principle that a court "need not defer to an agency's interpretation of its own regulations when those regulations, like § 552.109(a) and § 552.3, are unambiguous . . . ." Pet. App. 5a (citing *Christensen*, 529 U.S. at 588). But, while the principle is sound—it prevents an agency, "under the guise of interpreting a regulation, [from] creat[ing] *de facto* a new regulation" (*Christensen*, 529 U.S. at 588)—its use here is not. The problem is that the Second Circuit made no effort to read the Department's regulations as a whole. *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) ("[w]e must read the body of regulations . . . so as to give effect, if possible, to all of its provisions"). Instead, the court of appeals first read Section 552.3 in isolation and then, having ascertained its "unambiguous" meaning, decided that it prohibited the exemption granted by Section 552.109(a). As a result, the Second Circuit wound up attributing to the Department the extraordinarily improbable intention of, on the one hand, effectively declaring third party employees ineligible for the "companionship services" exemption in Section 552.3 (by excluding them from "domestic service employment") and then, on the other hand, simultaneously proclaiming in Section 552.109(a) that it was going to exempt them anyway. It is hard to imagine that the Department actually meant to do that, and any reading that leads to such an absurd outcome is itself proof that the regulations contain an ambiguity and demand a more coherent construction. The Department has provided a reasonable one and, under traditional principles of deference, that is enough. *See Stinson*, 508 U.S. at 45; *Martin*, 499 U.S. at 150-51.[11]

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[11] Judicial deference does not disappear merely because the Department has explored the possibility of other interpretations over time. *See* Pet. App. 30a-31a; 5a. Agencies are regularly faced with a choice among competing interpretations of a statute that they are charged with admin-

In the end, therefore, the Second Circuit should have granted *Skidmore* deference to Section 552.109(a), even if the regulation were deemed merely "interpretive." The decision to apply the Section 213(a)(15) companionship services exemption to third party employees, as well as homeowner-employed employees, is not just a reasonable, but in fact the better, interpretation of the critical statutory provisions. The Second Circuit should have given it more respect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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istering. *See Chevron*, 467 U.S. at 844. It would introduce intolerable rigidity into this process if the choice made by an agency were regarded as undeserving of deference simply because the agency had expressed a tentative contrary view and sought public comment on the various possible interpretations.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 03-7666-CV

EVELYN COKE,
Plaintiff-Appellant,

v.

LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,
Defendants-Appellees.

Argued: March 4, 2004
Decided: July 22, 2004
Remanded: Jan. 23, 2006
Decided: Aug. 31, 2006

Before WALKER, *Chief Judge*, KATZMANN, Circuit Judge, and GLEESON,* *District Judge*.

Remand from the United States Supreme Court for reconsideration of a March 4, 2004, decision by this court (John M. Walker, Jr., *Chief Judge*) affirming in part and vacating in part a judgment of the United States District Court for the Eastern District of New York. Upon further consideration we adhere to the disposition of our original decision.

AFFIRMED in part, VACATED in part, and REMANDED.

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* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

PER CURIAM.

A detailed discussion of the facts of this case and the regulatory scheme at issue is set forth in *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 121-25 (2d Cir.2004) ("*Coke I*"). The procedural history is this: Plaintiff-Appellant Evelyn Coke appealed from a final judgment entered in the United States District Court for the Eastern District of New York (Thomas C. Platt, *Judge*) granting Defendants-Appellees Long Island Care at Home and Maryann Osborne judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). *See Coke v. Long Island Care at Home, Ltd.*, 267 F.Supp.2d 332 (E.D.N.Y.2003). On appeal, this court affirmed in part and vacated in part the district court's judgment, holding that 29 C.F.R. § 552.6 is enforceable on its face but that 29 C.F.R. § 552.109(a) ("§ 552.109(a)") is unenforceable. *See Coke I*, 376 F.3d at 135. By an order dated January 23, 2006, the United States Supreme Court granted Defendants-Appellees' petition for a writ of certiorari, vacated this court's 2004 judgment, and remanded the case to "the Second Circuit for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No.2005-1 (December 1, 2005)." *Long Island Care at Home, Ltd. v. Coke*, --- U.S. ----, 126 S.Ct. 1189 (2006). For the reasons that follow, upon reconsideration in light of the Department of Labor's Wage and Hour Advisory Memorandum ("DOL Memo"), we adhere to our original position.

An administrative agency's rule implementing a statutory provision is entitled to the deference described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). There is no dispute that Congress delegated to the Department of

Labor ("DOL" or "the Department") the authority to promulgate legislative rules, which carry the force of law. But for substantially the same reasons set forth in our 2004 decision, we conclude that § 552.109(a) was not intended, at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule. While the original notice of proposed rulemaking indicates that the entirety of Part 552 of the Code of Federal Regulations was adopted pursuant to the authority delegated by 29 U.S.C. § 213(a)(15), it also indicates that the DOL proposes to add Part 552

> defining and delimiting, in Subpart A, the terms "domestic service employee," [and other terms undefined in the statute] and setting forth, in Subpart B, a statement of general policy and interpretation concerning the application of the Fair Labor Standards Act to domestic service employees.

Employment of Domestic Services Employees, Recordkeeping, Definitions and General Interpretations, 39 Fed.Reg. 35,382, 35, 382 (Oct. 1, 1974). This statement acknowledges that Part 552 is divided into two subparts, each of which has a different purpose. That statement, in combination with the facts that Subpart B is labeled "Interpretations" and that 29 C.F.R. § 552.2(c) indicates that "[t]he definitions required by section 13(a)(15) [of the FLSA] are contained in §§ 552.3, 552.4, 552.5, and 552.6," convinces us that our original conclusion that § 552.109(a) is an interpretive rule was correct. As such, it is entitled only to the level of deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (courts should defer to non-legislative agency rules according to their power to persuade). *See also Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The arguments to the contrary presented in the DOL Memo are not persuasive. The memo indicates that the DOL considers § 552.109(a) legally binding, and points out that, when it promulgated the final rule, it explained that the original

version would not have "allowed" the exemption for employees of third parties and that the DOL concluded that the exemptions "can be available" to such employees. The memo asserts that the quoted language indicates that DOL must have believed, at the time the rule was promulgated, that the availability of the exception to employees of third parties turned definitively on its pronouncement in § 552.109(a). But even if all other regulatory provisions were silent on the issue of third-party employees, § 552.109(a) could have been simply intended to provide guidance to DOL employees as to how the agency planned to interpret "domestic service employment" in the third-party employer context. This is, after all, the function that interpretive rules, opinion letters, agency manuals, enforcement guidelines, and other non-legislative agency rules that have been denied *Chevron* deference perform. *See Christensen*, 529 U.S. at 587. So even if the agency's determination of whether employees of third parties qualify for the companionship services exemption has always been dependent on § 552.109(a), that does not mean that regulation was promulgated as a legislative regulation intended to have the force of law outside of the agency.

Applying *Skidmore* deference to § 552.109(a), we see nothing in the DOL Memo to persuade us that our original conclusion was in error. We rested that conclusion on our determinations that the regulation is (1) inconsistent with Congress's likely purpose in enacting the 1974 amendments; (2) inconsistent with other regulations; (3) inconsistent with other DOL positions over time; and (4) insufficiently explained by DOL, evidencing a lack of thorough consideration. *Coke I*, 376 F.3d at 133.

After consideration of the DOL Memo, we acknowledge that, like most complex statutes, the FLSA has multiple purposes, some of which are in tension with one another. Among these purposes are a desire to expand the coverage of the FLSA to domestics, S.Rep. No. 93-690, 93d Cong., 2d

Sess., at 16, 18-20 (1974), to exempt companionship services from that coverage, *id.* at 20, to ensure that companionship and babysitting services remain affordable for working families, 18 Cong. Rec. 24,715 (1972), and to ensure minimum wage and overtime compensation for domestic workers who were regular bread-winners, responsible for supporting their families, S.Rep. No. 93-690, at 20. The third-party employer regulation as currently written would be consistent with some of these purposes and inconsistent with others. Consideration of congressional intent therefore does not lead to any definitive conclusion regarding the enforceability of § 552.109(a).

Our previously expressed concerns about the regulation remain valid. To the extent that the DOL Memo invites us to reconcile § 552.109(a) and 29 C.F.R. § 552.3 ("§ 552.3") with one another by ignoring the "extraneous vestige of the language's origin" included in the text of § 552.3, we decline to accept the invitation. While we agree that we must make every effort to interpret regulations in such a way as to give each of them meaning and effect, an effort that requires us to ignore the plain language of a regulation with the force of law places more weight on that rule of construction than it can bear. Moreover, we need not defer to an agency's interpretations of its own regulations when those regulations, like § 552.109(a) and § 552.3, are unambiguous. *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655.

With respect to the agency's inconsistent positions regarding § 552.109(a), we acknowledge DOL's statement in the DOL Memo withdrawing and repudiating all previous statements questioning the validity of that regulation. But a current repudiation of those past positions does not mean that they were never advanced. As firm as DOL's conviction is now that the current form of § 552.109(a) is the appropriate one, it cannot change the fact that, at multiple times in the past, the Department's position has been otherwise.

Finally, in our original opinion, we were specifically concerned with DOL's failure to explain both the inconsistency between § 552.109(a) and § 552.3 and the Department's decision in 1975 to promulgate a rule that was contrary to the one originally proposed. *Coke I*, 376 F.3d at 134. We acknowledge that the DOL Memo is evidence that the agency has spent some time considering its position with respect to § 552.109(a). We also recognize that the agency has considered and decided against amending the regulation on several occasions. But these facts do not address our concerns regarding the thoroughness of the original consideration and reasoning that went into the promulgation of § 552.109(a). To be sure, the DOL Memo attempts to explain the inconsistency between § 552.109(a) and § 552.3, but, as noted above, we find this explanation unpersuasive. And with respect to the "about-face," *Coke I*, 376 F.3d at 134, which the Department performed between the initial notice of proposed rulemaking and the adoption of the regulation in its current form, the DOL Memo is silent. As we pointed out in our March 2004 opinion, the explanation proffered in the Federal Register, see 40 Fed.Reg. 7404, 7405 (Feb. 20, 1975), ignored the plain language of the statute. *Coke I*, 376 F.3d at 134. The DOL Memo not only fails to acknowledge this faulty reasoning, it actually advances it once more as an argument that the current form of § 552.109(a) is consistent with the statutory text of 29 U.S.C. § 213(a)(15).

After reconsidering our 2004 decision in light of the DOL Memo, we find no reason to abandon the reasoning or the results reached in that decision. For the reasons set forth above and in our 2004 opinion, we AFFIRM the district court's ruling that 29 C.F.R. § 552.6 is enforceable on its face; VACATE the district court's ruling that 29 C.F.R. § 552.109(a) is enforceable; and REMAND the case for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,

v.

LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,
Defendants-Appellees.

Argued March 4, 2004
Decided July 22, 2004

Before: WALKER, *Chief Judge*, KATZMANN, *Circuit Judge*, and GLEESON, *District Judge*.[1]

JOHN M. WALKER, JR., *Chief Judge*:

At issue in this appeal is the enforceability of two regulations promulgated by the Department of Labor ("DOL") that define and interpret the "companionship services" exemption in the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 213(a)(15). The Act generally requires minimum wage and overtime compensation; the "companionship services" exemption relieves employers from paying such compensation to those employees who work in domestic service as babysitters and companions to the elderly and

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[1] The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

infirm. The regulations at issue implement the exemption with respect to companions.

The first regulation we consider is a regulation that defines the exemption. It includes within the exemption (1) those who perform household work related to the care of the elderly or infirm and (2) those who also perform housework incidental to their "companionship services" as long as the housework accounts for less than twenty percent of the weekly hours worked. *See* 29 C.F.R. § 552.6. The second regulation we consider applies the exemption to "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services." *See* 29 C.F.R. § 552.109(a). The district court found both of these regulations to be entitled to the highest form of deference available to agency regulations and, accordingly, found them legally enforceable. *See Coke v. Long Island Care at Home, Ltd.*, 267 F.Supp.2d 332 (E.D.N.Y. 2003).

We affirm the enforceability of the first regulation, § 552.6, according it the highest level of deference available to agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But we conclude that the second regulation, § 552.109(a), is neither entitled to *Chevron* deference nor enforceable; we find it to be entitled only to the more limited level of deference announced in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and reaffirmed in *United States v. Mead Corp.*, 533 U.S. 218 (2001). Because the second regulation is unpersuasive in the context of the entire statutory and regulatory scheme, it fails *Skidmore*'s test and cannot be enforced. Accordingly, we AFFIRM in part, VACATE in part, and REMAND for further proceedings.

FACTUAL BACKGROUND

Plaintiff-appellant Evelyn Coke appeals from the judgment on the pleadings, entered pursuant to Federal Rule of Civil

Procedure 12(c), in favor of defendants-appellees Long Island Care at Home, Ltd. and owner Maryann Osborne, by the United States District Court for the Eastern District of New York (Thomas C. Platt, *District Judge*). *See Coke*, 267 F.Supp.2d at 332-41. The Secretary of Labor submitted an amicus brief arguing on behalf of defendants-appellees that the district court's ruling should be affirmed.

Unlike most, if not all, of the other courts that have considered the issues in this appeal,[2] we review Coke's case before the summary judgment stage and, thus, without any factual development. All we know is that Coke filed this action under the FLSA, alleging that she was employed as a "home healthcare attendant" by defendants, who did not pay her minimum wage or overtime compensation. While such compensation is generally required under the FLSA, Coke acknowledges that the "companionship services" exemption to the FLSA, as defined and interpreted by the DOL regulations, applies to her employment and that if the regulations at issue are enforceable, she cannot prevail. Her arguments are purely legal.

Coke contends that the two regulations defining and interpreting "companionship services" are unreasonable and impermissible in light of the statute's clear language and statutory purpose. Coke candidly calls her action a test case, "challenging the regulation[s] on [their] face." She does not allege

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[2] We collect the full citations to such cases here in chronological order for ease of reference: *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107 (9th Cir.1990); *Cox v. Acme Health Servs., Inc.*, 55 F.3d 1304 (7th Cir. 1995); *Salyer v. Ohio Bureau of Workers' Comp.*, 83 F.3d 784 (6th Cir. 1996); *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294 (N.D.Okla. 1998); *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir.2000); *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175 (3d Cir.2000); *Harris v. Dorothy L. Sims Registry*, No. 00 C 3028, 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill. Jan.29, 2001); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir.2004).

that the regulations are being improperly applied to a subclass of employees but, rather, that they contravene legislative will and are therefore unenforceable. After the district court accorded the two regulations *Chevron* deference and found them to be permissible under the statute, it granted defendants' motion for judgment on the pleadings. This appeal followed.

DISCUSSION

I. *Standards of Review*

We review the decision of the district court *de novo* both because the judgment below was entered on the pleadings on a matter of statutory construction, *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir.2001); *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir.1994), and, more specifically, because the decision as to whether an FLSA exemption may be applied to a class of claimants is a question of law, *Freeman v. NBC*, 80 F.3d 78, 82 (2d Cir.1996). Moreover, the question of the appropriate level of deference to accord agency regulations is one purely of law, subject to *de novo* review. *See Ossen v. Dep't of Soc. Servs. (In re Charter Oak Assocs.)*, 361 F.3d 760, 764 (2d Cir.2004) (pure questions of law are reviewed *de novo*). *See generally* 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law. . . ."). At this stage of the litigation, it is conceded by both parties that there are no disputed issues of material fact.

Our review in the FLSA context is guided by a few specialized principles. Because the FLSA is a remedial act, its exemptions are to be narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959). And an employer bears the burden of proving that its employees fall within an exemption in the FLSA. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Arnold*, 361 U.S. at 392; *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir.1983). In sum, "[t]o extend an exemption to other than

those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Bearing these guiding principles in mind, we undertake our *de novo* review of the district court's decision upholding the two regulations at issue here.

II. *Statutory Scheme*

The FLSA, enacted by Congress in 1938, requires that most workers receive minimum wage and overtime compensation for hours worked in excess of forty per week. *See generally* 29 U.S.C. § 201 *et seq.* In 1974, Congress amended the FLSA to broaden its coverage to a new set of workers, previously unprotected by the Act: employees performing "domestic services." While the statute itself did not define "domestic service employment," the Senate Committee Report confirms the commonly understood meaning of the term to include those employed within the home as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs, and the like. *See* S.Rep. No. 93-690, at 20 (1974); *see also* H.R.Rep. No. 93-913, at 35-36 (1974), U.S.Code Cong. & Admin.News at 2811, 2845. However, while extending FLSA protections to employees in domestic service, Congress carved out an exemption for employees engaged in "babysitting services" and "companionship services." The exemption withholds FLSA benefits from:

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]) . . . .

29 U.S.C. § 213(a)(15). In order to more clearly delineate those who are subject to the exemption, the Secretary of

Labor, soon after the adoption of the 1974 amendments, promulgated a series of regulations, including the two that Coke challenges here.

III. *Regulatory Scheme*

The first regulation Coke challenges was promulgated in exercise of the authority delegated by § 213(a)(15) to define "companionship services." It defines "companionship services" as

> those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, [t]hat such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. § 552.6.

A related regulation (not challenged here), also promulgated in clear exercise of the authority delegated by § 213(a)(15), adopts the House Committee Report's definition of "domestic service employment." That regulation states that domestic service "refers to services of a household nature performed by an employee in or about a private home . . . . *of the person by whom he or she is employed.*" 29 C.F.R. § 552.3 (emphasis added); *cf.* H.R.Rep. No. 93-913, at 35, U.S.Code Cong. & Admin.News at 2845 (defining "domestic service employment" to be "services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed"); *see also* S.Rep. No. 93-690, at 20 (stating that the House's construction of "domestic service employment" to exclude third party employment is "generally accepted").

The second regulation Coke challenges, 29 C.F.R. § 552.109(a), also promulgated soon after the 1974 amendments, expressly extends the exemption by including employees "who are employed by an employer or agency other than the family or household using their services." Section 552.109(a) appears under the "Subpart B" heading, "Interpretations," as opposed to the "Subpart A" heading, "General Regulations," under which §§ 552.3 and 552.6 are listed. This regulation exempted employees who the DOL concedes were not exempt prior to the 1974 amendments. *See* Employment of Domestic Service Employees, 39 Fed.Reg. 35, 382, 35, 385 (proposed Oct. 1, 1974) (finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services" were "subject to the [FLSA] prior to the 1974 Amendments"). Prior to the promulgation of § 552.109(a), the DOL put out a different proposed rule for notice and comment: one that specifically declined to apply the "companionship services" exemption to employees of third party employers. *See id.* Following notice and comment on that proposed regulation, the agency reversed its position and offered the following explanation: "On further consideration, [the Secretary of Labor] ha[s] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." Application of the Fair Labor Standards Act to Domestic Service, 40 Fed.Reg. 7404, 7405 (Feb. 20, 1975) (codified at 29 C.F.R. pts. 516, 552). The statement accompanying the regulation did not explain how bringing these previously covered employees of third party employers within the exemption furthered the congressional purpose of expanding, and not narrowing, FLSA coverage from what it had been prior to 1974. The DOL did not extend the exemption to apply to those employees employed by third parties that provide "babysitting services." *See* 29 C.F.R. § 552.109(b).

The DOL has enforced the two regulations at issue since their promulgation in 1974 and Congress has not disturbed the details of the scheme recounted here in the nearly thirty years they have been in force. In early 2001, however, the agency proposed amendments to the regulations pertaining to the "companionship services" exemption, which were subsequently abandoned. In proposing the amendments, the DOL stated:

> Due to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance with activities of daily living are performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated. The number of workers providing these services has also greatly increased, and most of these workers are being excluded from the FLSA under the companionship services exemption. The Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section [2]13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of "companionship services," which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent.

See Application of Fair Labor Standards Act to Domestic Service, 66 Fed.Reg. 5481, 5482 (proposed Jan. 19, 2001). The DOL further explained what it understood to have been the congressional intent in 1974:

> [I]t clearly was Congress' intent under the 1974 FLSA Amendments to cover all workers who performed domestic services as a vocation, excluding casual babysitters and providers of companionship services who

> were not regular bread winners or responsible for their [own] families' support, . . . Personal and home care aides perform a variety of tasks in the home, including household work and assistance with nutrition and cleanliness. Employers have generally treated workers employed as home health aides and personal and home care aides as exempt companions, based upon the Department's current regulations. . . . As a result, the Department believes it is necessary to amend the regulations to focus them on fellowship and protection duties that Congress originally intended the companion exemption to cover.

Id. at 5483. The 2001 proposed amendments to the regulations would have extended FLSA protection to employees who are hired by "someone other than a member of the family in whose home he or she works." *Id.* at 5482. The DOL expressly acknowledged that there exists an internal inconsistency between § 552.109(a) and § 552.3 and that § 552.3 is more consistent with the congressional purpose as it existed in 1974. *Id.* at 5485. Nonetheless, without further addressing the inconsistency, the DOL withdrew the proposed amendments in April 2002 because "numerous comment[s] on the proposed rule, including [comments offered by] multiple government agencies . . . seriously called into question the Department's conclusion that there would be little economic impact." Application of the Fair Labor Standards Act to Domestic Service, 67 Fed.Reg. 16,668 (Apr. 8, 2002). Upon withdrawing the proposed amendments, the DOL did not question or otherwise comment upon its 2001 conclusion about what congressional intent had been in 1974.

IV. *The Enforceability of 29 C.F.R. § 552.6*

A. Degree of deference to accord to the DOL

The district court accorded *Chevron* deference to § 552.6's definition of "companionship services." Neither party in

this case objects to this because the statute directed the DOL to promulgate legislative regulations to define the term "companionship services" as it appears in 29 U.S.C. § 213(a)(15), and the regulations are plainly an exercise of that authority. *See Mead*, 533 U.S. at 226-27, 121 S.Ct. 2164 (clarifying that *Chevron* deference is appropriate when a statute clearly delegates authority to an agency and the agency acts purporting to exercise that authority); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir.2002); 29 C.F.R. § 552.2(c) (expressly stating that "[t]he definitions required by § [2]13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6"). Accordingly, § 552.6 is binding on the courts unless procedurally defective, "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Here, Coke argues that § 552.6 is unenforceable as being manifestly contrary to the statute.

In applying *Chevron* deference, we follow a two-step analysis: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. When the terms of a statute are unambiguous, the judicial inquiry is complete. However, if there is ambiguity in the statute, we proceed to step two and inquire whether the agency's legislative regulation is a reasonable and permissible construction of the statute. *Id.* at 843-44. "If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding." *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) (internal quotation marks omitted) (citing *Chevron*, 467 U.S. at 843 n. 11). We are also mindful that "a long-standing, contemporaneous construction of a statute by the administering agenc[y] is entitled to great weight." *Leary v. United States*, 395 U.S. 6, 25 (1969) (internal quotation marks and citations omitted).

B. Application of *Chevron*

Coke argues that we needn't arrive at step two of the *Chevron* inquiry and that we should find that the statute plainly and on its face prohibits the agency's definition of "companionship services." In particular, she contends that the regulation's inclusion within the definition of both housework *related to* the care of the elderly or infirm and housework *incidental to* that care are violative of the statute's command to fashion an exemption only for "companionship services." Coke suggests that the large amount of incidental housework permitted by the current regulation (twenty percent of the work) is an abuse of the delegation under the statute. Indeed, she argues, under a particular reading of the regulation's second sentence (the one that allows work "related to" the care of the elderly or infirm), "household work" would be exempt even if no companionship were provided at all: "Under the regulation, an elderly person unable to care for him or herself could hire a full-time companion *and* a full-time cook, pay the cook less than the minimum wage, and successfully assert that cooking is a companionship service . . . ." Appellant's Br. at 16. Thus, because Congress clearly indicated that "companionship services" were meant to be a subset of domestic services, and the regulation can be read to exempt pure domestic service without companionship, Coke argues that the regulation was drawn too broadly on its face. Since Congress wanted to make sure domestic service employees got FLSA protection, she argues that § 552.6's extension of the exemption to "meal preparation, bed making, [and] washing of clothes" places too many domestic service employees within the exemption, a result that Congress could not have intended. The district court properly rejected these arguments.

The statute plainly gives the DOL authority to define "companionship services," a vague term with no obvious plain meaning; and the DOL did so very soon after the

passage of the amendments to the FLSA. On the face of the statute, we discern no unambiguous congressional intent to keep all "incidental" services and domestic services "related to" the care of the elderly and infirm outside the exemption, especially when such services would naturally follow from or be part of a reasonable job description of a companion to the elderly or infirm.

Although the Supreme Court has issued mixed messages as to whether a court may consider legislative history at this stage of the analysis (step one of *Chevron*),[3] that history plainly presupposes that some incidental or other related housework would accompany "companionship." For example, Senator Quentin Burdick wanted to extend FLSA coverage for "professional domestic[s]" but was concerned about the potential burden on household employers where "people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them. This, of course, entails some work, such as perhaps making lunch . . . . This would be incidental to the main purpose of the employment." 119 Cong. Rec. 24,773,

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[3] *Compare FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 137, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (effectively considering legislative history at step one of *Chevron* analysis), *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697-99, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) (same), *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-50, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (same), *and Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233-41, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (same), *with K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n. 4, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) (opinion of Kennedy, J.) (noting in the first step of a *Chevron* inquiry that "any reference to legislative history [ ] is in the first instance irrelevant"), *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (finding statutory text clear enough to ignore any arguments from legislative history), *and Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (finding only statutory text to be relevant for first-step *Chevron* analysis).

24,801 (1973). Senator Harrison Williams explained the purpose of the "companionship services" exemption through an analogy to the "babysitting" exemption:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for-to watch the youngsters.
>
> "Companion," as we mean it, is in the same role-to be there and to watch an older person, in a sense.
>
> . . . . .
>
> [Household work] which is purely incidental would not change the category of the person being there in the household.

Id. Without attaching primacy to using legislative history at step one, it seems to us more likely than not that Congress understood that when employees are in the home "first" to be companions or babysitters, they may engage in "incidental" housework without falling outside the exemption. The DOL's regulatory choice of the twenty percent allowance for incidental work is not clearly contravened by either the text of the statute or the intent of Congress to the extent it is discernable.

More troubling is the second sentence of the regulation, which is not delimited by the twenty percent rule. It does seem to allow, as Coke argues, virtually unlimited household work as long as it is "related to the care of the aged or infirm person." The DOL, however, in its amicus brief explains:

> Under section 552.6, an employee must "provide fellowship, care, and protection" for a person unable to care for himself in order to meet the requirements of the "companionship services" exemption. While the regulation allows for the performance of some household work, it must be either "related to" or "incidental" to the "care of the aged or infirm person. *See* 29 C.F.R.

> 552.6." Thus, contrary to [Coke's] suggestion, an employee hired only to perform household work or as a "full-time cook" would not meet the requirements of the regulation. An employee who has not been hired primarily to provide "fellowship, care, and protection" will not be considered exempt under the Act or the regulations.

Br. of Amicus Curiae DOL at 19 (citations omitted). The DOL's explanation is adequate. At best, the regulation is ambiguous on the question of whether the first sentence of the regulation must be satisfied—that an employee must first provide "fellowship, care, and protection"—before proceeding to the inquiry about whether to exempt the "related" household work.

We note, however, that we have no occasion to limit the enforcement of § 552.6 to the DOL's litigation position here because Coke concedes that her challenge is to the regulation "on its face," that is, in all its applications. Coke has specifically refused to challenge the regulation "as applied" to any particular class of employees. We do not rule out the possibility of an application that would contravene the plain statutory mandate, but because there are many applications of the regulation that are consistent with the statute, we cannot declare it invalid on its face. *See generally Reno v. Flores*, 507 U.S. 292, 301 (1993) (extending the no-set-of-circumstances test for facial constitutional challenges to statutes under *United States v. Salerno*, 481 U.S. 739 (1987), to *Chevron* challenges). In any event, Coke presents no facts upon which we could conclude that the agency has ever applied the regulation in the purportedly impermissible way she envisions.

If we refused to consider the unequivocal legislative history at step one of *Chevron*, the statute is at best ambiguous on the question of whether incidental services and household work related to the care of the individual may accompany the

fellowship and companionship focus of the exemption.[4] And step two of *Chevron* requires us to inquire if the DOL's regulation "harmonizes with the language, origins, and purpose of the statute." *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir.1998). Consideration of legislative history is generally accepted at this stage of the analysis. *E.g.*, *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *Bankers Life*, 142 F.3d at 983.

Coke also argues that § 552.6 fails step two of *Chevron*. Coke repeats the arguments she makes in connection with step one and also focuses on Senator Burdick's statement in the legislative history that sums up the "companionship services" exemption as one targeted for "elder sitter[s]." *See* 119 Cong. Rec. at 24,801. Coke intimates that a sitter must only sit, without lifting a hand to help the elderly or infirm with incidental housework. But, again, we agree with the district court that § 552.6 survives the *Chevron* inquiry. The Senate Report, cited by Coke, makes clear that some incidental household work and housework related to the care of the elderly or infirm does not contravene the purpose of the exemption. *See* 119 Cong. Rec. at 24,801 (1973). The idea that a sitter merely sits is belied by Senator Burdick's analogy: Sitters provide care, and care entails other incidental tasks such as food preparation, feeding, cleaning up messes, changing diapers, and other services. Accordingly, given the deference afforded the agency under *Chevron*, we are unable

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[4] The DOL's 2001 statements do not prove that § 552.6 is unenforceable. First, the DOL's contemporaneous assessment of congressional intent is more probative: Apparently, the DOL thought § 552.6 represented congressional intent in 1974 and the enacting Congress expressed no discontent. Second, the DOL's interpretation of congressional intent, whether in 2001 or 1974, could never be dispositive for our *Chevron* inquiry. Of course, the entire purpose of the *Chevron* inquiry is to determine congressional intent quite apart from what the agency interprets that intent to be. Only if we conclude that the enacting Congress's intent is ambiguous do we defer to reasonable interpretations of the gap left by the ambiguity.

to conclude that § 552.6 is arbitrary, capricious, or manifestly contrary to the statute with respect to either (1) the twenty percent allowance for incidental housework in the agency's legislative regulation, or (2) the agency's allowance for household work related to the care of the individual.

Every circuit to have considered the question of the enforceability of § 552.6 has found the regulation enforceable on its face. *See, e.g., Johnston*, 213 F.3d at 565; *Salyer*, 83 F.3d at 787; *McCune*, 894 F.2d at 1110. Only *Harris*, 2001 WL 78448, at *5, 2001 U.S. Dist. LEXIS 23263, at *17, a district court decision from the Northern District of Illinois, found the regulation too broad. *Harris*, of course, in no way binds us. Moreover, *Harris* was an "as applied" case and its ultimate pronouncement was narrow. While it calls § 552.6 "unreasonably broad" in the text of the opinion, *id.* at *3, 2001 U.S. Dist. LEXIS 23263, at *11, it is more circumspect when it announces its final holding: "§ 552.6, as currently drafted, is invalid *to the extent it exempts homemakers from [FLSA] coverage*," *id.* at *5, 2001 U.S. Dist. LEXIS 23263, at *17 (emphasis added); only the particular case of the regulation "as applied" to homemakers—as the plaintiffs were in that case—was held to be outside the "companionship services" exemption.

In the case before us, however, because Coke does not tell us anything about what "home healthcare attendants" actually do, it is impossible for us to pass on the question of whether the particular work she did was considered by Congress to be outside the exemption. Consistent with her facial challenge to § 552.6, Coke refused to amend her complaint to be more specific about what she does. For the foregoing reasons, the regulation withstands *Chevron* deference on this challenge. Accordingly, we AFFIRM the district court's ruling with respect to the enforceability of § 552.6.

V. *The Enforceability of 29 C.F.R. § 552.109(a)*

We now turn to Coke's challenge to § 552.109(a), which applies the exemption to "companionship services" rendered by those who are employed by third parties, rather than by the family of the recipient of the services.

A. Degree of deference to accord to the DOL

The threshold question concerning § 552.109(a)'s enforceability is the degree of deference to be afforded the DOL. Coke argues that the district court erred by according *Chevron* deference to the regulations that the DOL itself calls "interpretations." The DOL argues that such deference was appropriate. Although the district court did not directly consider the question, it is purely one of law, which we consider *de novo*. *See Ossen*, 361 F.3d at 764.

In favor of applying *Chevron* deference is *Chevron* 's own broad statement and *Mead*'s endorsement of that statement:

> When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or Capricious in substance, or manifestly contrary to the statute.

Mead, 533 U.S. at 227 (citation omitted) (quoting *Chevron*, 467 U.S. at 843-44). Thus, to the extent that the statute is silent on the definition of a "domestic service employee" and contains no reference to third party employers, such matters might be understood to be appropriately delegated to the DOL. An agency interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27, 121 S.Ct. 2164 (emphasis added). The

statute, 29 U.S.C. § 213(a)(15), expressly delegated authority to the DOL to define and delimit the terms "companionship services" and "domestic service employee," and the DOL argues that *Chevron* deference follows accordingly.

Moreover, the regulation at issue is "a long-standing, contemporaneous construction of a statute," and, as such, "entitled to great weight." *Leary*, 395 U.S. at 25 (internal quotation marks omitted). Indeed, Congress has revisited § 213 by amending it seven times since 1974, without expressing any disapproval of the DOL regulation at issue, *see* Pub.L. No. 95-151 (1977); Pub.L. No. 96-70 (1979); Pub.L. No. 101-157 (1989); Pub.L. No. 103-329 (1994); Pub.L. No. 104-88 (1995); Pub.L. No. 104-188 (1996); Pub.L. No. 105-78 (1997). Such congressional acquiescence is "persuasive evidence that the [agency] interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).[5]

Finally, when an agency action is "'the fruit[ ] of notice-and-comment rulemaking or formal adjudication,'" courts generally accord the agency *Chevron* deference. *Chao*, 291 F.3d at 227 (quoting *Mead*, 533 U.S. at 230). Here, no one contests that, although the agency calls § 552.109(a) an

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[5] The argument from congressional acquiescence-affectionately known as the "dog didn't bark canon"-must always be qualified by the observation that evidence of what subsequent Congresses intend pales in comparison to probative evidence about what the enacting Congress intended; even *Schor* did not rely on what it called the "silence" rule. 478 U.S. at 846, 106 S.Ct. 3245. *See generally* William N. Eskridge, Jr. et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 1020-21 (3d ed.2001) (discussing the "dog didn't bark canon"). Furthermore, because Congress, in amending § 213, never reenacted the FLSA or the relevant provisions thereof, this is not a case that implicates the "re-enactment rule" delineated in *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), where "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without [relevant] change."

"interpretation," it was promulgated following notice and comment procedures. However, it is also true (and a cause of concern) that the rule the agency adopted after comments were received was the opposite of the rule proposed in the original notice. There was no separate notice and comment on the rule as ultimately adopted.

All courts that have considered § 552.109(a) have accorded it *Chevron* deference. *See, e.g., Johnston*, 213 F.3d at 561-62; *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d at 1299 n. 2. But Coke is correct that none of these prior cases carefully considered the question before us now: Does *Mead*, which post-dates the cases affording § 552.109(a) *Chevron* deference, require a different analysis yielding a different result insofar as it holds that some agency regulations should be accorded less than *Chevron* deference?

Coke argues that *Mead* requires us to apply a lesser degree of deference to § 552.109(a) as an "interpretive," rather than a "legislative" regulation. Indeed, "interpretive rules . . . enjoy no *Chevron* status as a class." *Mead*, 533 U.S. at 232.

This circuit, even before the Supreme Court's clarification in *Mead*, contemplated that interpretive regulations should not receive full *Chevron* deference. In *Reich v. New York*, 3 F.3d 581, 587 (2d Cir.1993), we considered DOL regulations promulgated to define and delimit the administrative exemption in the FLSA at 29 U.S.C. § 213(a)(1). We held, "In contrast to the controlling authority given the [DOL's] *legislative* rules—i.e., those promulgated pursuant to an express grant of Congressional authority—the respect accorded the [DOL's] *interpretive* regulations depends upon their persuasiveness . . . ." *Id.* We foretold the precise distinction later drawn in *Mead* when that Court distinguished between those regulations that are accorded *Chevron* deference and those that are not. In *Reich v. New York*, the interpretations from which *Chevron* deference was withheld were classified as "interpretations" by the regulations themselves. *See also*

Freeman, 80 F.3d at 83-84 (refusing to accord *Chevron* deference to DOL interpretations under the FLSA despite their promulgation with notice and comment procedures); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n. 18 (3d Cir.1994) ("The DOL interpretations do not have the force of law.").

We find § 552.109(a) to be an interpretive rather than a legislative regulation. While the rule "grants rights, imposes obligations, or produces other significant effects on private interests," as legislative regulations do, *White v. Shalala*, 7 F.3d 296, 303 (2d Cir.1993) (internal quotation marks omitted), a rule can only be legislative "if the agency intended to use [the legislative power delegated to it by Congress] in promulgating the rule at issue," *American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 707 F.2d 548, 558 (D.C.Cir.1983). Here, the DOL did not intend to use the legislative power delegated in § 213(a)(15) when it promulgated § 552.109(a). This is most apparent from its inclusion of the regulation under "Subpart B—Interpretations" as opposed to "Subpart A—General Regulations." This appearance is supported by substance.

Congress expressly delegated to the DOL authority to define terms in § 213(a)(15), and the DOL expressly states in 29 C.F.R. § 552.2(c) that "[t]he definitions required by § [2]13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." Accordingly, the regulation at issue, § 552.109(a), is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15). *Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless "it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. Thus, § 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15).

The DOL places emphasis on the fact that in 1974 § 552.109(a) was promulgated after notice and comment and, indeed, *Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference. *Mead*, 533 U.S. at 230-31, 121 S.Ct. 2164. However, "while notice and comment are required for legislative rules, they are by no means prohibited for interpretive rules." *Mejia-Ruiz v. INS*, 51 F.3d 358, 365 (2d Cir.1995). *Mead* does nothing to undermine this conclusion. *See Mead*, 533 U.S. at 230-31, 121 S.Ct. 2164; Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L.Rev. 807, 814 (2002) ("I do not think the Court was saying [in *Mead*] . . . that if an agency adopts notice-and-comment or trial-type hearing procedures *on its own authority*, its interpretation is presumptively entitled to *Chevron* deference." (emphasis removed and emphasis added; citations omitted)).

In this case, the agency undertook a notice and comment procedure for an interpretative regulation despite the fact that the procedure was not required. While *Mead* does not offer specific guidance on whether putting a proposed interpretation out for notice and comment has any effect on deference, following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what it did; it does not alter the fact that the agency did not act pursuant to legislative authority.

In any event, here we cannot ignore that the notice and comment procedure for § 552.109(a) was at best idiosyncratic and at worst insufficient. The original notice informed the public that employees of third party employers were *not* going to be exempt from the FLSA (consistent with § 552.3), *see* 39 Fed.Reg. 35,385 (proposed Oct. 1, 1974), but the final rule provided exactly the opposite without a detailed explanation, *see* 40 Fed.Reg. 7405 (Feb. 20, 1975). Because we conclude that § 552.109(a) is interpretative, and thus need not

have conformed with notice and comment procedures, we have no occasion to decide whether this regulation is invalid under the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A). *Cf. Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir.1986) ("[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.") (internal quotation marks omitted). Nevertheless, we decline the DOL's invitation to bootstrap an entitlement to *Chevron* deference for an interpretative regulation from this substandard notice and comment procedure.[6]

While we agree with Coke that § 552.109(a) does not command *Chevron* deference, *Mead* nevertheless requires us to afford the agency some level of deference with the vague prescription to "tailor deference to variety," 533 U.S. at 236, 121 S.Ct. 2164. We believe that *Skidmore* deference based upon the regulation's "power to persuade" is the appropriate level of deference to be applied where, as here, "the agency has some special claim to expertise under the statute." Merrill, *supra*, at 812. To the extent that the regulation represents "more specialized experience and broader investigations and information" available to the agency, we will defer to reasonable regulations. *Skidmore*, 323 U.S. at 139-40; *see also Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inapplicable). In deter-

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[6] Merrill finds "interpretive regulations adopted after notice-and-comment procedures" to be within an "area of uncertainty" after *Mead* for lower courts trying to determine whether to apply *Chevron* deference. Merrill, *supra*, at 821. *But see* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo. Wash. L.Rev. 347, 350 (2003) (treating notice and comment procedures as affording the agency a "safe harbor" entitlement to *Chevron* deference). We needn't choose between Merrill and Vermeule here because even if Vermeule is right, special circumstances surrounding the notice and comment procedures here militate against furnishing the agency with a safe harbor.

mining its "power to persuade," we look to § 552.109(a)'s "consisten[cy] with the congressional purpose," *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); its consistency with other regulations, *see Skidmore*, 323 U.S. at 140; the "consistency of the agency's position" over time, *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977); the "thoroughness evident in [the agency's] consideration"; and the "validity of its reasoning," *Skidmore*, 323 U.S. at 140.

B. Application of *Skidmore*

Considering the regulation's persuasiveness under *Skidmore*'s less deferential standard, we agree with Coke that § 552.109(a) is unenforceable. The regulation is inconsistent with Congress's likely purpose in enacting the 1974 amendments; inconsistent with other regulations (which themselves deserve *Chevron* deference); and inconsistent with other agency positions over time. Moreover, the agency does not proffer valid reasoning for § 552.109(a)'s enforceability, evidencing a lack of thorough consideration.

(1) Congressional purpose

When Congress sought to amend the FLSA in 1974, it desired to expand FLSA coverage to "domestic service employees," and to exempt from coverage only those "domestic service employees" engaged in "companionship services." At the time, persons who were employed by a third party were outside the category of "domestic service employees" and were protected by the FLSA before the 1974 amendments. *See Homemakers Home & Health Care Servs., Inc. v. Carden*, 538 F.2d 98 (6th Cir.1976); 39 Fed.Reg. 35,385 (Oct. 1, 1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . [were] subject to the [FLSA] prior to the 1974 Amendments"); 66 Fed.Reg. 5485 (Jan. 19, 2001). *See generally* Molly Biklen, Note, *Healthcare in the Home:*

Reexamining the Companionship Services Exemption to the Fair Labor Standards Act, 35 Colum. Hum. Rts. L.Rev. 113, 117 (2003). It is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered.

(2) Consistency with other regulations and through time

Section 552.109(a) is also jarringly inconsistent with other regulations the DOL itself promulgated under the FLSA immediately following the 1974 amendments. In 29 C.F.R. § 552.3, the DOL defined the term "domestic service employment" to refer "to services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed.*" 29 C.F.R. § 552.3 (emphasis added). Unlike § 552.109(a), this regulation was legislative, issued pursuant to § 213(a)(15) and, thus, entitled to *Chevron* deference. *See* 29 C.F.R. § 552.2(c) ("[t]he definitions required by [§ 213(a)(15)] are contained in [ ] § 552.3"). Plainly, under § 552.3, employees employed by third parties do not qualify for the exemption. Indeed, § 552.3 tracks the relevant legislative history that the DOL would have reasonably taken as its guidance. *See* H.R.Rep. No. 93-913, at 35 ("the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home *of the person by whom he or she is employed*" (emphasis added)). Thus, the stark internal inconsistency between § 552.109(a) and § 552.3, when coupled with the latter's entitlement to greater deference and its greater consistency with congressional purpose, strongly counsels against enforcement of § 552.109(a).

Moreover, the agency's position with regard to FLSA coverage through time has hardly been a model of consistency. We have recounted above how, in 1974, the agency proposed a regulation that would have afforded FLSA coverage to

employees of third party employers only to reverse itself with the promulgation of § 552.109(a). In 2001, the DOL again proposed that employees of third party employers get FLSA coverage (contrary to the view it endorses in this litigation), only to withdraw the proposal shortly thereafter based on economic considerations that have no bearing on the more relevant question of what Congress intended in 1974.

(3) Validity of the DOL's reasoning

Finally, the DOL's inadequate reasoning in support of the regulation is matched by its failure to exhibit thoroughness in its consideration. Two omissions are particularly notable. First, the DOL offered virtually no explanation for the direct inconsistency between § 552.109(a) and § 552.3. Second, the DOL has not adequately explained-either in the Federal Register or in its submissions to this court-what accounted for the about-face after putting the regulations out for notice and comment in 1974, resulting in third party employers, for the first time, being entitled to claim the exemption. *Compare* 39 Fed.Reg. 35,385 (proposing a regulation on October 1, 1974 that retained the FLSA coverage of employees of third party employers), *with* 40 Fed.Reg. 7405 (adopting a regulation on Feb. 20, 1975 allowing such employees to be subject to the exemption). While the Federal Register recited that "[o]n further consideration, [the Secretary of Labor] ha[s] concluded that the ['companionship services'] exemption can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services," 40 Fed. Reg. 7404, the DOL ignored the plain language of the statute, which precluded an interpretation that the exemption could apply to "any" employee; on its face, it may apply only to employees in "domestic service employment." 29 U.S.C. § 213(a)(15); *see also* 29 C.F.R. § 552.3 (defining "domestic service employment" to preclude employees of third party employers).

The agency's reasoning has not improved with time. Acknowledging the internal contradiction between § 552.109(a) and § 552.3 in its brief, the DOL today is reduced to asserting that we should uphold the regulation because other courts have done so. This is hardly an argument. As we have explained, the decisions relied upon by the DOL were all prior to the Supreme Court's *Mead* decision, based on which we hold that *Chevron* deference is inapplicable to § 552.109(a). Thus, no other court has considered § 552.109(a) under the proper *Skidmore* level of deference and carefully analyzed the regulation's "power to persuade" in accordance with the factors appropriate to *Skidmore* 's inquiry.

Accordingly, finding that § 552.109(a) cannot survive *Skidmore* analysis, we decline to enforce it. We hereby Vacate the judgment of the district court upholding it, and Remand the case for further consideration consistent with this opinion.

CONCLUSION

For all the foregoing reasons, we Affirm the district court's ruling that 29 C.F.R. § 552.6 is enforceable on its face; Vacate the district court's ruling that 29 C.F.R. § 552.109(a) is enforceable; and Remand the case for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT, E.D. NEW YORK

No. 02-CV-2010(TCP)(ARL)

EVELYN COKE, individually and
on behalf of others similarly situated,
Plaintiff,

v.

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,
Defendants.

May 23, 2003

MEMORANDUM AND ORDER

PLATT, District Judge.

Defendants Long Island Care At Home, Ltd. ("LIC") and Maryann Osborne ("Osborne")(collectively "Defendants") move for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff Evelyn Coke ("Coke" or "Plaintiff") opposes the motion and also moves for the circulation of a Notice of Pendency and a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b). This Court heard oral arguments on April 2, 2003.

At issue is whether certain regulations promulgated by the Department of Labor ("DOL") pursuant to the Federal Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.* (the "FLSA") are legally enforceable. At oral argument Plaintiff's counsel clarified that Plaintiff could not meet the requirements of the

relevant regulations as written and that the purpose of this action was to determine the validity of such regulations.[1] (Tr. at 2-5.) As set forth below, because the Court finds that the DOL's regulations are proper Defendants' Motion is GRANTED.

BACKGROUND

A. Factual Background

Plaintiff is a resident of the State of New York, County of Queens, and a former employee of Defendants. LIC is a corporation formed pursuant to the laws of New York State. Osborne is the owner and sole shareholder, as well as a director and officer of LIC.

The pleadings provide little factual background.[2] Accordingly to the Complaint, Plaintiff has been employed by Defendant since 1997 and that "her occupations include, but are not limited to, work as a home healthcare attendant." (Compl. at 10.) Plaintiff contends that despite working more than 40 hours a week she never received overtime payments and that her hourly wage was less the minimum wage outlined in the FLSA.

B. Plaintiff's Claims

Plaintiff has asserted two claims in her Complaint. The First Claim is brought under the FLSA on behalf of Plaintiff and any other persons who consent in writing to join this action pursuant to 29 U.S.C. § 216(b). Plaintiff contends that she was entitled to, but was not paid, minimum wages and an overtime hourly wage of time and one-half for all hours worked in excess of forty hours per week. Plaintiff's Second

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[1] References to the transcript of the April 2, 2003 are cited as Tr. at _.

[2] While the Plaintiff has provided more details of her employment in an affidavit, the Court may not consider such statements when deciding a Rule 12(c) motion.

Claim is brought under the Labor Law of the State of New York and the New York Minimum Wage Act ("NYMWA"), on behalf of Plaintiff and all persons similarly situated. The nature of the claims are identical to those under the First Claim. As relief, Plaintiff requests a judgement for unpaid overtime wages and minimum wages, liquidated damages, attorney's fees, interest and costs as provided for by the FLSA.

Defendant has asserted nine affirmative defenses, including that, workers such as Plaintiff are exempt from eligibility for minimum wage and overtime compensation under the FLSA and the FLSA's implementing regulations.

At oral argument, the Court inquired of Plaintiff's counsel whether he could amend the Complaint to sufficiently allege a cause of action under the FLSA and the regulations promulgated thereunder. Counsel indicated that he could not. (Tr. at 2-5.)

DISCUSSION

A. Rule 12(c) Standard

Rule 12(c) provides that,

> [a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Judgement on the pleadings, pursuant to Fed.R.Civ.P. 12(c) is appropriate where material facts are undisputed and a judgment on the merits is possible merely by considering the contents of the pleadings. *See Mennella v. Office of Court Admin.*, 938 F.Supp. 128, 131 (E.D.N.Y.1996) (Spatt, J.) (citing *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642

(2d Cir.1988)). "In considering a motion for a judgment on the pleadings, the Court must accept as true all of the non-movant's well pleaded factual allegations, and draw all reasonable inferences in favor of the non-movant." *Id.* (citing *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir.1994)).

B. The FLSA Generally

The FLSA of 1938 was enacted for the purpose of regulating minimum wages, *335 maximum working hours, and child labor in industries within interstate commerce. While the FLSA sought to protect some of the nation's lowest paid workers, it did not apply to all employees. Since 1938, Congress has extended the FLSA's coverage to many other low-paying occupations through periodic amendments.

Among these extensions of coverage were the amendments of 1974, in which Congress extended coverage to employees in "domestic service." Through the 1974 amendments Congress intended to "not only raise the wages of these workers but [to] improve the sorry image of household employment." H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in*, 1974 U.S.Code Cong. & Admin. News 2811, 2843. The 1974 amendments made domestic service employees subject to the minimum wage and maximum working hours requirements of the FLSA.

The 1974 amendments Congress do provide for a limited exemption from the FLSA for certain domestic service employees, as set forth in 29 U.S.C. § 213(a)(15) ("Section 213(a)(15)"). Section 213(a)(15) provides, in pertinent part, that the provisions minimum wage and maximum hour requirements of Sections 206 and 207 of the FLSA shall not apply to,

> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals

> who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited in the regulations of the Secretary*) (emphasis added).

Pursuant to this Congressional delegation of authority, the DOL promulgated 29 C.F.R. § 552.6 ("Section 552.6") which defines "companionship services." It states, in pertinent part,

> the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general housework: Provided however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.

In discussing the policy reasons for the "companionship services" exemption the Ninth Circuit has stated, "[w]e are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA". *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 1110 (1990).

"Domestic service" itself is not defined in the FLSA. However, the legislative history of the 1974 amendments state,

> the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. The domestic service must be performed in a private home which is a fixed place of abode of the individual or family . . . [g]enerally, domestic service in and about a private home includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, jani-

> tors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. H.R.Rep. No.93-913, 93rd Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 2811, 2845.

The legislative history also "reveals that Congress used the term 'domestic service employment' interchangeably with the terms 'domestic service in households,' 'private household workers,' and 'household employment.'" *Lott v. Rigby*, 746 F.Supp. 1084, 1088 (N.D.Ga.1990)(citing H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in*, 1974 U.S.Code Cong. & Admin. News 2811, 2842-2843).

The DOL has incorporated the legislative history into 29 C.F.R. § 552.3 ("Section 552.3") which states that domestic service "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3. Importantly however, through 29 C.F.R. § 552.109(a) ("Section 552.109(a)") the DOL extends the exemption to "[e]mployees who are engaged in providing companionship services, as defined by § 552.6, and *who are employed by an employer or agency other than the family or household using their services.*" 29 C.F.R. § 552.109(a) (emphasis added.)

C. Validity of Sections 552.6 and 552.109(a)

Plaintiff argues that both of these regulations are inconsistent with Congress's intent of extending coverage of the FLSA to domestic service employees. Specifically, Plaintiff argues that the definition of "companionship services" in Section 552.6 is overbroad and that Section 552.109(a) improperly extends the exemption to employees who are employed by an agency.[3]

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[3] Subsequent to oral argument, the Court invited the parties to submit additional materials related to the legislative history of the 1974 amend-

In regards to Section 552.109(a), Plaintiff asserts that prior to the 1974 amendments home healthcare employees employed by certain agencies would have been covered by "enterprise coverage" as set forth in 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a), which extends FLSA coverage to all employees of businesses that exceed a certain gross revenue. Plaintiff cites *Homemakers Home and Health Care v. Carden*, 538 F.2d 98 (6th Cir.1976) to support her position. In that case the Sixth Circuit upheld a stipulated finding of fact that the plaintiff, who was a home health care services company, was subject to FLSA enterprise coverage. Plaintiff reasons that in enacting the 1974 amendments Congress intended to extend coverage to domestic services employees, and not to remove coverage already provided to employees employed by FLSA "enterprises." (Pl. Suppl. Mem. at 8.)

Nearly all courts, however, have upheld both of these regulations. *See e.g., McCune v. Oregon Senior Services Division*, 894 F.2d 1107 (1990)(upholding Section 552.6); *Salyer v. Ohio Bureau of Workers' Compensation*, 83 F.3d 784 (6th Cir.1996)(same); *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir.2000)(upholding Section 552.109). One recent district court decision is to the contrary. *See Harris v. Dorothy L. Sims Registry*, 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001). The Second Circuit has never expressly ruled on these issues.

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,

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ments. Plaintiff's supplemental materials, in part, raised for the first time the issue of whether 552.109 was procedurally invalid due to an alleged failure to comply with the Administrative Procedures Act, 5 U.S.C. § 553. Because this argument was not raised until several weeks after oral argument, does not appear in the Complaint or Plaintiff's initial brief, and was outside the scope of the Court's invitation, this argument was not considered by the Court.

and the principle of deference to administrative interpretations" has consistently been followed. *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 844 (1984). If there is "statutory ambiguity and the agency's interpretation is reasonable, its interpretation must receive deference." *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 123 S.Ct. 371, 378 (2002) (citing *Chevron*, 467 U.S. at 844). "[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.*

In deciding whether a regulation is reasonable, the Supreme Court has stated,

> [w]e ask first whether 'the intent of Congress is clear' as to 'the precise question at issue.' If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.' *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Moreover, "a long-standing, contemporaneous construction of a statute by the administering agencies is 'entitled to great weight.'" *Leary v. United States*, 395 U.S. 6, 25 (1969) (citations omitted). Where an agency changes its interpretation, "a revised interpretation deserves deference because 'an initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider

varying interpretations and the wisdom of its policy on a continuing basis.'" *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (citing *Chevron*, 467 U.S. at 862-864,).[4]

Both Sections 552.6 and 552.109(a) were promulgated in 1975, soon after the 1974 amendments and have been in effect for over twenty-eight years and are therefore entitled to great weight. The DOL did propose amendments to both regulations in January 2001, but those proposed amendments were withdrawn in 2001. In proposing to amend Section 552.6, the DOL stated,

> [t]he Department has reevaluated the regulations and determined that-as currently written-they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of 'companionship services,' which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent. *Federal Register*, Vol. 66, No. 13 (January 19, 2001).

The DOL's proposals emphasized that the proposed amendments were proper due to the significant changes in the home care industry since 1974 and that home care employees are "performing types of duties and working in situations that were not envisioned when the companionship services regula-

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[4] In addition, the Supreme Court has held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)). Here Congress has amended Section 213 seven times since 1974. *See* Pub.L. 95-151 (1977); Pub.L. 96-70 (1979); Pub.L. 101-157 (1989); Pub.L. 103-329 (1994); Pub.L. 104-88 (1995); Pub.L. 104-188 (1996); Pub.L. 105-78 (1997).

tions were promulgated." *Id.* After reviewing the legislative history, the DOL stated that the 1974 amendments were intended "to include all employees whose vocation was domestic service, but to exempt from the coverage babysitters and companions who were not regular bread winners or responsible for their families' support." *Id.*

In proposing to amend Section 552.6, the DOL stated that, "companionship services cannot be so broad as to include someone who essentially is serving as a maid or household worker." *Id.* The DOL then proposed three possible changes of the definition of "companionship services." All three of the proposals increased the emphasis on fellowship as a "critical component of a companion's duties." *Id.*

In proposing to alter Section 552.109(a), the DOL intended to make the exemptions of Section 213(a)(15) applicable "only with respect to the family or household using the worker's services." *Id.* Under the proposal, if an employee was hired by someone other than a member of the family in whose home he or she works, the employee would be covered by FLSA. *Id.* In this proposed amendment, the DOL noted that there was an internal consistency between Section 552.109(a), which allows employees of agencies to be exempt, and Section 552.3, fashioned from the legislative history, which states that domestic service employment must be "in or about" the private home of the employer. *Id.* Moreover, evidently in reference to "enterprise coverage", the DOL stated that since "[a]nyone who prior to 1974 had worked for a covered placement agency, for example, but who was assigned to work in someone's home, would have been covered previously by the FLSA," it was unlikely that Congress would have sought to change the status of employees who were already covered. *Id.*

In April 2002, the DOL withdrew the proposed amendments because "numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into

question the Department's conclusion that there would be little economic impact." *Federal Register*, Vol. 67, No. 67 (April 8, 2002). After reviewing the "rulemaking record as a whole," the DOL terminated the proposal. *Id.*

After the proposed amendments were issued, but before they were withdrawn, one district court did find that the definition of "companionship services" set forth in Section 552.6 was unreasonably broad. In *Harris v. Dorothy L. Sims Registry*, 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001), the court found that although an agency's interpretation of a statute is presumptively valid, "courts may not follow agency regulations that are inconsistent with congressional intent." *Id.*, 2001 WL 78448, *2, 2001 U.S. Dist. LEXIS 23263 at *8 (citing *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). In coming to its conclusion, the court relied heavily on the proposed amendments.

Applying the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), the *Harris* court first found that Section 213(a)(15) of the FLSA was ambiguous, since there was more than one reasonable interpretation of "companionship services." The plaintiffs in *Harris* argued that the term "referred to employees hired primarily to act as a companion for the elderly." *Harris*, 2001 WL 78448, *3, 2001 U.S. Dist. LEXIS 23263 at *9-*10. Defendants contended that the term meant "being with someone to help them with their extreme needs." *Id.*

After finding Section 213(a)(15) ambiguous, the *Harris* court then considered whether Section 552.6 was consistent with the language, origins and purpose of the statute. In this stage of the analysis, the court first considered the legislative history, from which it found, "[i]t is clear the senators did not intend to exempt employees whose primary job responsibilities went beyond fellowship and protection." *Id.*, 2001 WL 78448, *4, 2001 U.S. Dist. LEXIS 23263 at *12. After a review of the DOL's proposed amendments the court found

"it is obvious from the proposed amendments that the DOL agrees that the current definition of 'companionship services' under § 552.6 is unreasonable" and that this "alone is sufficient reason to disregard the current version of § 552.6." *Id.*, 2001 WL 78448, *5, 2001 U.S. Dist. LEXIS 23263, at *17. Based on the legislative history and the proposed amendments, the court in *Harris* held that Section 552.6 was invalid, "to the extent it exempts homemakers from [FLSA] coverage."[5] *Id.*

Prior to *Harris*, all other courts had upheld the validity of the regulations. In *McCune v. Oregon Senior Services Division*, 894 F.2d 1107 (1990) the Ninth Circuit held that the DOL's definition of "companionship services" in Section 552.6 was not contrary to the FLSA and affirmed the district court's granting of summary judgment in favor of defendants.

The plaintiffs in *McCune* were live-in attendants for elderly and infirm individuals unable to care for themselves. The Ninth Circuit, noting the strong deference which is accorded to agencies entrusted to define a specific provision of a statute, held that the 20% limit on general household work was reasonable and upheld the district's courts finding that any household work "related" to the care of the individual would not be counted towards the 20% threshold. In coming to this conclusion, the court quoted parts of the legislative history of the FLSA, which stated:

> The fact that a person performing casual services as baby-sitters or services as companions do some incident of household work does not keep them from begin casual baby-sitters or companions for purposes of this exclusion.

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[5] In *Harris*, although the finding that § 552.6 was invalid mooted the argument that domestic employees hired by agencies should not be exempt, the court did note that Section 552.109(a) was also proposed to be amended for similar reasons Section 552.6 was proposed to be amended. *Id.*, 2001 WL 78448, *5, n. 8, 2001 U.S. Dist. LEXIS 23263, at *17, n. 8.

McCune, 894 F.2d 1107, 1111 (quoting H.R.Rep. No. 913, 1974 U.S.Code Cong. and Ad. News at 2845).

In dissent in *McCune*, Judge Pregerson did "not propose challenging the agency's interpretation of its mandate when it promulgated section 552.6," but argued that the majority had improperly applied the regulation to the plaintiffs in that case. *McCune*, 894 F.2d at 1114. Judge Pregerson felt that the court should analyze whether the work performed by plaintiffs was actually "incidental" or whether it was only related to the care of their clients. As Judge Pregerson stated, "[t]hough simple laundry work might be 'incidental', what of bed-pan duty, catheterization, and soiled garments for bed-ridden invalids? These duties are certainly related to the care of the attendant's clients, but are by no means incidental." *Id.*

Courts have similarly upheld Section 552.109(a). Most recently, in *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir.2000), the Tenth Circuit rejected plaintiffs' claims that they were entitled to overtime pay under the FLSA because they were not employed by the individual receiving the care. Finding that Section 552.109(a) was not "arbitrary, capricious, or manifestly contrary to § 213(a)(15)", the Court held that "the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." *Id.* at 562. In refuting a similar claim, another court has stated, "[p]laintiff has identified no authority, and the Court is unable to locate any, that supports this view of the companionship services exemption. In fact, the Court is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299, n. 2 (N.D.Ok.1998).

In regard to Plaintiff's argument that Congress did not intend to remove "enterprise coverage" to those employees who worked for covered agencies, the wording of the Section 213(a)(15) and the statements of the Administrator of the

Wage and Hour Division of the DOL (the "Administrator") support the conclusions of the *Johnston* and *Terwilliger* courts that Section 552.109(a) is valid. Section 213(a)(15), describes who is covered by the companionship exemption as "any employee employed on a casual basis in domestic service employment." (emphasis added.) The Administrator, in adopting 552.109(a) explicitly noted this language and stated "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions". 40 Fed.Reg. 7404 (1975). It may be that Congress did not intend to exempt employees hired by a third-party. However, based on the wording of the statute and the lack of any clear legislative history discussing this specific issue, this Court may not say that the Administrator's interpretation is arbitrary or unreasonable.

This Court does find the reasoning of *Harris* and the DOL's statements in the proposed amendments somewhat compelling. However, other factors counsel against holding the regulations unenforceable. The strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years, strongly cautions against a finding that these regulations are unenforceable.

Section 213(a)(15) of the FLSA explicitly gives the DOL the right to define the terms "companionship services" and "domestic service." The 20% requirement seemingly attempts to keep the exemption limited to those who predominately provide companionship, which is consistent with the legislative history. In regards to Section 552.109(a), the Court notes that the reasoning behind the companionship services exemption is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring

of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA.

The DOL's interpretation of Section 213(a)(15) in 1975 evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments shows that it still believes that these long-standing regulations are appropriate in the current home healthcare environment. Despite amending Section 213(a)(15) seven times since 1074, Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate. Accordingly, the Court finds that Sections 552.6 and 552.109(a) are not arbitrary, capricious or manifestly contrary to the FLSA.

D. The Sufficiency of the Complaint

1. The FLSA Claim

Having found the regulations proper, Plaintiff must properly allege a claim under them. The Court is aware that all of the cases cited above were in the context of motions for summary judgement, not motions on the pleadings pursuant to Rule 12(c). Nonetheless, the Complaint in its current form contains only conclusory allegations that Plaintiff was a home healthcare attendant and that she is therefore entitled to minimum wage and overtime pursuant to FLSA. Plaintiff's counsel clarified at oral argument that his client could not properly allege a claim under the FLSA based on the regulations as they currently stand. Plaintiff's counsel's agreement at oral argument that this was a test case and that his client could not meet the standards of Section 552.6 confirm that Plaintiff can not properly allege a violation of the FLSA and the DOL's

regulations promulgated thereunder. Accordingly, Defendants' motion on the FLSA claim is granted.

2. State Law Claim

Courts have consistently held that the dismissal of a plaintiff's federal claims merits dismissal of his pendent State law claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 314 (2d Cir.1995)(citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)); *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 61 (2d Cir.1998). Having concluded that Defendants are entitled to judgment on the pleadings as to Plaintiff's underlying federal claims, this Court declines to exercise pendent jurisdiction over the corresponding State law claims. Plaintiff's State law claims are therefore dismissed without prejudice.

CONCLUSION

Defendants' Motion for judgement on the pleadings is GRANTED. Plaintiff's Motion for circulation of a Notice of Pendency and of a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b) is DENIED. The Clerk of the Court is directed to close this case.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666-cv

COKE

v.

LONG ISLAND CARE

October 10, 2006

ORDER

Before: Hon. John M. WALKER, Jr., Hon. Robert A. KATZMANN, *Circuit Judges*, Hon. John GLEESON, *District Judge*[*]

IT IS HEREBY ORDERED that Appellee's motion to stay the mandate for ninety (90) days pending submission of a petition for writ of certiorari to the United States Supreme Court is GRANTED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK
By: [Tracy W. Young, Motions Staff Attorney]

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[*] The Honorable John Gleeson, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

APPENDIX E

WAGE AND HOUR ADVISORY MEMORANDUM

No. 2005-1

MEMORANDUM December 1, 2005

FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: ALFRED B. ROBINSON, JR.
Deputy Administrator

SUBJECT: Application of Section 13(a)(15) to
Third Party Employers

Policy and Interpretation for Applying the
Section 13(a)(15) Exemption

The purpose of this memorandum is to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). As indicated in Opinion Letter FLSA 2005-12, the Division continues to adhere to its regulation, set out at 29 C.F.R. § 552.109(a), exempting companions who are employed by third parties from the minimum wage and overtime requirements of the FLSA. Regional Administrators and District Directors are instructed to continue to apply the exemption in states outside the Second Circuit.

Rationale for Applying the Exemption

The following explains and justifies the Division's policy to continue to apply the section 13(a)(15) exemption in all jurisdictions except those that comprise the Second Circuit Court of Appeals.

The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee's activities and the place of their performance, without regard to the identity of the employer. Section 13(a)(15) ex-

empts "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). This language is naturally read to exempt any employee who provides companionship services to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers.

The Department's regulations explicitly state that the companionship exemption applies to companions employed by third party employers. The Department promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its additional authority to issue regulations to implement the 1974 FLSA amendments. 40 Fed. Reg. 7404 (1975); *see* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (authority to issue implementing regulations). Section 552.109(a) of Part 522 [*sic*] provides:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime requirements by virtue of section 13(a)(15).

In promulgating 29 C.F.R. § 552.109(a), the Department explained that applying the exemption to employees of third parties "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975). The Department continues to agree with that assessment because the statutory phrase "any employee" indicates that the exemption is natu-

rally read to apply based on the activities of the employee, not identity of the employer. *See, e.g.*, 29 C.F.R. § 780.303 (exemption in 29 U.S.C. § 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); 29 C.F.R. § 780.403 (exemption in 29 U.S.C. § 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities").

Section 552.109(a) is also consistent with the policy objectives that Congress was pursuing in creating the companionship exemption. Soon after the regulations were promulgated, the Department explained that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. Op. Ltr. WH-368, 1975 WL 40991 (DOL Nov. 25, 1975). In particular, legislators were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. *See* 119 Cong. Rec. 24,797 (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick). That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party.

In *Coke v. Long Island*, *supra*, the Second Circuit ruled that section 552.109(a) of the Department's regulations is inconsistent with congressional intent and with section 552.3 of the regulations. The Department disagrees. As explained above, Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment. Thus, it is unsurpris-

ing that the text of the statute focuses exclusively on the nature of the activities that companions perform and does not even hint that the source of a companion's employment is a relevant factor. Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions. *See, e.g.*, 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air").

Moreover, the congressional committee reports that discuss section 13(a)(15) repeatedly emphasize that the key factors in determining whether an employee qualifies for the companionship exemption are the nature of the employee's activities, *see, e.g.*, H.R. Rep. No. 93-913, at 33 (1974) ("The bill exempts . . . employees employed *in the capacity* of companion to an individual who, by reason of age or necessity, necessitates a companion.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) ("It is not, however, the Committee's intent to include within the term 'domestic service' such activities as casual babysitting and acting as a companion.") (emphasis added); 119 Cong. Rec. 24,801 (1973) (describing tasks performed by companions) (statements of Sens. Burdick and Williams); H.R. Conf. Rep. No. 93-413, at 27 (1973) (explaining that the kinds of services that are performed by trained personnel such as nurses do not fall within the exemption), and the place that the activities are performed. *See, e.g.*, S. Rep. No. 93-300, at 22 (1973) ("The domestic service must be performed in a private home which is a fixed place of abode of an individual or family"); S. Rep. No. 93-690, *supra*, at 20 (same); 119 Cong. Rec. at 24,799 ("A dwelling used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.") (statement of Sen. Williams).

The Department's regulations are not only consistent with congressional intent, but they are also internally consistent. The regulations address the issue of third party employment in only one place-section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption. The Department intentionally chose to include third party employees within the exemption after careful deliberation. When the regulations were first proposed, the Department drafted section 552.109 to exclude companions employed by third party employers from the exemption. 39 Fed. Reg. 35,382, 35,385 (1974). After reviewing the comments it received, however, the Department reconsidered its position. When the regulations were issued in final form, the Department adopted the present language of section 552.109(a), which expressly includes companions employed by third party employers within the exemption. The Department explained that "[o]n further consideration, [it had] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975).

The Department's January 19, 2001 NPRM and the Second Circuit's decision in *Coke v. Long Island* identified a conflict between section 552.109(a)'s pronouncement that the companionship exemption extends to third party employers and section 552.3's definition of "domestic service employment." *See* 66 Fed. Reg. at 5485; *Coke v. Long Island*, 376 F.3d at 133-34. The Department has reviewed section 552.3 and another regulation, 29 C.F.R. 552.101(a), which also addresses the concept of "domestic service employment." The regulations' definition of "domestic service employment" is relevant to determining the scope of the companionship exemption because the text of section 13(a)(15) exempts only those companions who are "employed in *domestic service*

employment to provide companionship services." Thus, the statute seems to contemplate that to qualify for the exemption, an employee must *both* "provide companionship services" *and* be "employed in domestic ser vice employment." If the definition of "domestic service employment" in sections 552.3 and 552.101(a) is properly read as excluding all third party employees, then those provisions can fairly be said to be significantly in tension with section 552.109(a), which expressly includes companions employed by third party employers.

The Department does not believe, however, that sections 552.3 and 552.101(a), when properly read in context, speak to the issue of third party employment. Neither provision explicitly mentions the subject. And unlike section 552.109(a), there is no indication that the Department ever considered the potential impact of the provisions on the coverage of third party employees, much less that it actually intended the provisions to entirely exclude them. To the contrary, at the time the regulations were promulgated the Department seems to have believed that sections 552.3 and 552.101(a) did not resolve the issue of third party employment, since it included a separate section-section 552.109-in both the NPRM and the final rule to expressly address the subject.

Admittedly, there are phrases in sections 552.3 and 552.101(a) that could potentially be read to exclude third party employees from the definition of "domestic service employment." Section 552.3 provides:

> As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handy men, gardeners, footmen, grooms, and chauffeurs

> of automobiles for family use. It also includes baby sitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

And section 552.101(a) explains:

> The definition of *domestic service employment* contained in § 552.3 is derived from the regulations is sued under the Social Security Act (20 CFR 404.1057) and from the "generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." *See* S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

The statement in section 552.3 that domestic service employment is "performed by an employee in or about the private home . . . *of the person by whom he or she is employed*," and the statement in section 552.101(a) that domestic service employment "must be performed in or about the private home *of the employer*," could be read to exclude companions who are employed by third party employers from the scope of the exemption. As explained above, however, there is no reason to believe that the Department intended the provisions to have that effect. Because there are available readings of the various regulations that allow them to be internally reconciled, the Department believes that they can and should be read in harmony. *See generally* 73 CJS Public Admin. Law and Proc. § 211 (2005) ("The court should read a regulation as an entirety, and should harmonize the various parts and provisions of the entire regulation and give them effect, if possible.").

Sections 552.3 and 552.101 are best read as describing the kinds of work that constitute domestic service employment and establishing that such work must be performed in a private home, rather than in a place of business. The references in those provisions to domestic service employment needing to be performed in the home of the employer are not intended to address the issue of third party employment, but rather are an extraneous vestige of the language's origin in the Social Security regulations. *See* S. Rep. No. 93-690, *supra*, at 20. *See also* 20 C.F.R. § 404.1057 (social security regulation describing "[d]omestic service in the employer's home"); 26 C.F.R. § 31.3121(a)(7)-1(a)(2) (social security tax regulation describing "[d]omestic service in a private home of the employer").

Because the Department borrowed the language of sections 552.3 and 552.101 from the congressional committee reports underlying the 1974 amendments to the FLSA without discussion or elaboration, the legislative history must be consulted to determine their meaning. Significantly, while the legislation was being drafted, Congress repeatedly referred to and discussed in detail its view that work must be performed in a private home to qualify as "domestic service employment." For example, the 1974 amendments extending FLSA coverage to domestic workers did so by referring to employees "employed in domestic service *in a household*." P.L. 93-259, § 7(b)(1), 88 Stat. 55, 62 (1974) (emphasis added). The committee reports, in turn, described the newly covered workers using a variety of phrases emphasizing the importance of the employment bring performed in a private home: "domestic service employees in *private households*," S. Rep. No. 93-300, *supra*, at 20 (emphasis added); "domestic service *in and about a private home*," *id.* at 22 (emphasis added); "domestic service employees *employed in households*," H.R. Rep. No. 93-232, *supra*, at 31 (emphasis added); "*household* domestic employees," S. Rep. No. 93-758, *supra*, at 27 (emphasis added); "employee in domestic service *in a house-*

hold," *id.* (emphasis added); "domestic service workers," H.R. Rep. No. 93-913, *supra*, at 11; and "*private household* workers." S. Rep. No. 93-690, *supra*, at 19 (emphasis added). Indeed, the reports contain a detailed discussion of Congress's intention to require that covered domestic ser vice be performed in a private home:

> The domestic service must be performed in a private home which is a fixed place of abode of an individual family. A separate and distinct dwelling maintained by an individual or family in an apartment house or hotel may constitute a private home. However, a dwelling house used primarily as a boarding or lodging house for the purpose of sup plying such services to the public, as a business enterprise, is not a private home.

S. Rep. No. 93-300, *supra*, at 22. *See also* S. Rep. No. 93-690, supra, at 20 (same); H.R. Rep. No. 93-913, *supra*, at 33 (same). This passage is particularly significant because it supplies content and meaning to the sentence immediately preceding it-specifically, the previously referenced sentence that draws upon the language of the Social Security regulations to define "domestic service employment" and states that its generally accepted meaning relates to "services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed." The fact that the sentence is immediately followed by a descriptive passage elaborating on the sentence's requirement that domestic service employment must be performed in a private home, but making no mention at all of the issue of third party employment, makes it clear that the sole purpose of the sentence is to specify the place where domestic service employment must be performed.

The sentence from the committee report is incorporated virtually verbatim into section 552.3, with the only modification being the addition of a brief parenthetical specifying that a private home can be fixed or temporary. In the view of the

Department, when the sentence was imported into the regulations from the committee report, it carried with it the meaning ascribed to it by Congress. The Department signaled its understanding that the sentence should be read as addressing place of performance but as not speaking to third party employment in two distinct ways. First, the one change the Department made to the sentence was the insertion of a parenthetical explaining that, with respect to the place of performance, a private home can either be fixed or temporary. The insertion of the parenthetical shows that the Department was primarily concerned with clarifying the operative effect of the regulation on the place of performance requirement. Second, the Department drafted a separate regulatory provision specifically to address the issue of third party employment. This would have been entirely unnecessary if the definition of domestic service employment excluded third party employment-particularly at the NPRM stage, when the meaning of the two provisions would have been aligned. In sum, all signs indicate that neither Congress nor the Department intended the sentence that first appeared in the committee report and was then incorporated into section 552.3 to be construed as excluding employees who are employed by third party employers from the definition of domestic service employment.

In fact, if the sentence in question were construed as excluding all employees of third party employers from the definition of domestic service employment, it would have the perverse effect of excluding many domestic workers from the coverage of the FLSA-despite Congress' express intent "to include within the coverage of the Act all employees whose vocation is domestic service," excepting only casual babysitters and companions for the aged and infirm. *See* S. Rep. No. 93-690, *supra*, at 20 (emphasis added); s*ee also* H.R. Conf. Rep. No. 93-413, at 27 (1973); S. Conf. Rep. No. 93-358, at 27 (1973). Prior to the enactment of the 1974 amendments, the only domestic workers that were covered by the

FLSA were those employed by "covered enterprises," which are currently defined by the FLSA as businesses with annual gross sales of at least $500,000 that employ at least two employees in interstate commerce. *See* 29 U.S.C. § 203(s); see also 29 U.S.C. § 203(s) (1970) ($250,000 threshold applicable at time of 1974 amendments). Two categories of domestic workers generally were not covered prior to the amendments: those employed by homeowners because there usually was no basis for individual coverage and those employed by third party employers that did not meet the test for enterprise coverage. There can be no question that Congress intended for the 1974 amendments generally to cover both of these categories, with only a few expressly enumerated exceptions. Yet if the sentence in the committee report is construed as excluding all third party employers from the definition of domestic service employment, then those domestic workers who are employed by third-party employers that are not covered enterprises would to this very day not be covered by the FLSA.[1] That result is contrary to Congress' express intent, and cannot be correct.

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[1] Unlike the sentence in the committee report, section 552.3 of the regulations purports to define domestic service employment only "[a]s used in section 13(a)(15) of the Act." As mentioned previously, however, since the Department copied the sentence from the committee report virtually verbatim into the regulations, there is no reason to believe that the Department intended for it to have a different meaning than the one that was attached to it by Congress. Indeed, there is good reason to believe that despite section 552.3's purported limitation of the definition to the companionship exemption, the Department in fact intended the provision to supply a general definition of the term as used throughout the Act. First, there is no other provision in the regulations that supplies an alternative definition of domestic service employment. Second, the examples that the regulation provides of workers that qualify as domestic service employees-including gardeners, handy men, janitors, grooms, and valets-have little or nothing to do with the provision of companionship services, but instead fall within the broader category of domestic workers generally. *See* 29 C.F.R. 552.3.

Sections 552.3 and 552.101(a) should also not be read as addressing the issue of third party employment because doing so would render them inconsistent with themselves. Section 552.101, which elaborates on the definition of domestic service employment provided by section 552.3, specifies that "private household workers" are included within the definition of domestic service employees. The term "private household workers" has long been understood by both Congress and the Department to include the employees of third party employers. During the time Congress was considering the 1974 amendments to the FLSA, the Department submitted reports defining the term as:

> [A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence.

See Department's 1973 Report to Congress on Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act at 27; 1974 Report at 31-32. The second prong of the definition unambiguously includes domestic workers who are employed by third party employers. It is not surprising that the Department incorporated private household workers into the regulations' definition of domestic service employment, since Congress referred to the Department's reports on several occasions, *see* H.R. Rep. No. 92-232, *supra*, at 31; H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19-20; 119 Cong. Rec. 24,796 (statement of Sen. Dominick), and repeatedly used the phrase "private household workers" interchangeably with the term "domestic service employees." *See* H.R. Rep. No. 93-233, *supra*, at 31 (using the term "domestic service employees" and "private household workers" in a single paragraph to describe the same set of employees); S. Rep. No. 93-300, *supra*, at 21-22

(describing the same set of employees in successive paragraphs using the interchangeable terms "private household workers," "domestics," "household workers," and "domestic workers"); H.R. Rep. No. 93-913, *supra*, at 33; S. Rep. No. 93-690, *supra*, at 19. In fact, the Department's definition of "private household worker" was quoted in full during the floor debate in the Senate on the amendments to the FLSA. *See* 119 Cong. Rec. at 24,796 (statement of Sen. Dominick). Since section 552.101(a) clearly states that at least some domestic workers employed by third party employers are included within the definition of domestic service employees, it makes no sense to construe the ambiguous language requiring that domestic service "be performed in or about the private home of the employer" as designed to exclude them.

The governing rules of legal interpretation require the Department to adopt a reading of the regulations that harmonizes them and renders them internally consistent as a whole. *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) (Court must read regulations "so as to give effect, if possible, to all of its provisions"); *APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) ("[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error") (citations and internal quotations omitted); *Miller v. AT&T Corp.*, 250 F.3d 820, 832 (4th Cir. 2001) ("Whenever possible, this court must reconcile apparently conflicting provisions"). If sections 552.3 and 552.101(a) were read to exclude third party employees from the definition of domestic service employment, it would not only create a conflict with section 552.109(a), but it would also be inconsistent with section 552.101(a)'s inclusion of "private household workers" within the definition of domestic service employment and with Congress's express intent "to include within the coverage of the

Act all employees whose vocation is domestic service." *See* S. Rep. No. 93-690, *supra*, at 20; H.R. Conf. Rep. No. 93-413, *supra*, at 27; S. Conf. Rep. No. 93-358, *supra*, at 27. By contrast, when sections 552.3 and 552.101(a) are read as requiring that domestic service employment be performed in private homes, but as not addressing the issue of third party employment, the regulations are fully harmonized and rendered internally consistent. Consequently, the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment. Read in that context, I find no inconsistency between sections 552.3 and 552.109(a). All prior statements by the Department to the contrary, including the Department's January 19, 2001 NPRM, *see* 66 Fed. Reg. at 5485, are hereby repudiated and withdrawn.

The Department is aware that the Second Circuit suggested in *Coke v. Long Island Health Care, Ltd.*, 376 F.3d at 131-33, that the Department's regulations governing third party employment were intended to be advisory interpretations only, and that they therefore do not have the force and effect of law. That is not the case; the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding. When the Department promulgated the final regulations in February 1975, it noted that as originally proposed, section 552.109(a) "would not have allowed the [FLSA] section 13(a)(15) or the [FLSA] section 13(b)(21) exemption for employees who, although providing companionship services, are employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. 7404-05 (emphasis added). The Department stated in the final rule that it had changed its mind, "conclud[ing] that these exemptions *can be available* to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Id.* at 7405 (emphasis added). The highlighted language makes it clear that at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third

party employers turned decisively on its pronouncement in the regulations-something that could be true only of a legislative rule. Accordingly, the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis.

APPENDIX F

STATUTES

Pertinent provisions of the current Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, include:

§ 203. Definitions

As used in this chapter—

. . .

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

. . .

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

. . .

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other

organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

. . .

§ 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

. . .

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

. . .

(f) Employees in domestic service

Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not

because of section 209(a)(6) of the Social Security Act [42 U.S.C.A. § 409(a)(6)] constitute wages for the purposes of title II of such Act [42 U.S.C.A. § 401 et seq.], or

(2) who in any workweek—

(A) is employed in domestic service in one or more households; and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

. . .

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent a mendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

. . .

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

. . .

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

. . .

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary);

. . .

******

The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, April 8, 1974, 88 Stat. 55, also included the following provision, at 88 Stat. 76:

§ 29(a). Except as otherwise specifically provided, the amendments made by this act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act."

REGULATIONS

Pertinent provisions of 29 C.F.R., Subtitle B. Regulations Relating to Labor, include:

Chapter V. Wage and Hour Division, Department of Labor
Subchapter A. Regulations

Part 552. Application of the Fair Labor Standards Act to Domestic Service

Subpart A. General Regulations

. . .

§ 552.2 Purpose and scope.

(a) This part provides necessary rules for the application of the Act to domestic service employment in accordance with the following amendments made by the Fair Labor Standards Amendments of 1974, 88 Stat. 55, et seq.

(b) Section 2(a) of the Act finds that the "employment of persons in domestic service in households affects commerce." Section 6(f) extends the minimum wage protection under section 6(b) to employees employed as domestic service employees under either of the following circumstances:

(1) If the employee's compensation for such services from his/her employer would constitute wages under section 209(a)(6) of title II of the Social Security Act, that is, if the cash remuneration during a calendar year is not less than $1,000 in 1995, or the amount designated for subsequent years pursuant to the adjustment provision in section 3121(x) of the Internal Revenue Code of 1986; or

(2) If the employee was employed in such domestic service work by one or more employers for more than 8 hours in the aggregate in any workweek.

Section 7(l) extends generally the protection of the overtime provisions of section 7(a) to such domestic service employ-

ees. Section 13(a)(15) provides both a minimum wage and overtime exemption for "employees employed on a casual basis in domestic service employment to provide babysitting services" and for domestic service employees employed" to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." Section 13(b)(21) provides an overtime exemption for domestic service employees who reside in the household in which they are employed.

(c) The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6.

§ 552.3 Domestic service employment.

As used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

§ 552.4 Babysitting services.

As used in section 13(a)(15) of the Act, the term babysitting services shall mean the custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside. The term "babysitting services" does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational, or practical nurses. While such trained personnel do not qualify as babysitters, this fact does not

remove them from the category of a covered domestic service employee when employed in or about a private household.

§ 552.5 Casual basis.

As used in section 13(a)(15) of the Act, the term casual basis, when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: Provided, however, that such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

§ 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

. . .

Subpart B. Interpretations

§ 552.99 Basis for coverage of domestic service employees.

Congress in section 2(a) of the Act specifically found that the employment of persons in domestic service in households affects commerce. In the legislative history it was pointed out that employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce (S. Rep. 93-690, pp. 21-22). The Senate Committee on Labor and Public Welfare "took note of the expanded use of the interstate commerce clause by the Supreme Court in numerous recent cases (particularly Katzenbach v. McClung, 379 U.S. 294 (1964))," and concluded "that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act" (S. Rep. 93-690, pp. 21-22).

§ 552.100 Application of minimum wage and overtime provisions.

(a)(1) Domestic service employees must receive for employment in any household a minimum wage of not less than that required by section 6(a) of the Fair Labor Standards Act.

(2) In addition, domestic service employees who work more than 40 hours in any one workweek for the same employer must be paid overtime compensation at a rate not less than one and one-half times the employee's regular rate of pay for such excess hours, unless the employee is one who resides in the employer's household. In the case of employees who reside in the household where they are employed, section 13(b)(21) of the Act provides an overtime, but not a minimum wage, exemption. See § 552.102.

(b) In meeting the wage responsibilities imposed by the Act, employers may take appropriate credit for the reasonable cost or fair value, as determined by the Administrator, of food, lodging and other facilities customarily furnished to the employee by the employer such as drugs, cosmetics, dry-cleaning, etc. See S. Rep. 93-690, p. 19, and section 3(m) of the Act. Credit may be taken for the reasonable cost or fair value of these facilities only when the employee's acceptance of them is voluntary and uncoerced. See regulations, part 531. Where uniforms are required by the employer, the cost of the uniforms and their care may not be included in such credit.

(c) For enforcement purposes, the Administrator will accept a credit taken by the employer of up to 37.5 percent of the statutory minimum hourly wage for a breakfast (if furnished), up to 50 percent of the statutory minimum hourly wage for a lunch (if furnished), and up to 62.5 percent of the statutory minimum hourly wage for a dinner (if furnished), which meal credits when combined do not in total exceed 150 percent of the statutory minimum hourly wage for any day. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing meals, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair value is different from the meal credits specified above: Provided, however, that employers keep, maintain and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures.

(d) In the case of lodging furnished to live-in domestic service employees, the Administrator will accept a credit taken by the employer of up to seven and one-half times the statutory minimum hourly wage for each week lodging is furnished. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing lodging, whichever is less, as determined in accordance with part 531 of this chapter, if such cost or fair

value is different from the amount specified above, provided, however, that employers keep, maintain, and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures. In determining reasonable cost or fair value, the regulations and rulings in 29 CFR part 531 are applicable.

§ 552.101 Domestic service employment.

(a) The definition of domestic service employment contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from "the generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

(b) Employees employed in dwelling places which are primarily rooming or boarding houses are not considered domestic service employees. The places where they work are not private homes but commercial or business establishments. Likewise, employees employed in connection with a business or professional service which is conducted in a home (such as a real estate, doctor's, dentist's or lawyer's office) are not domestic service employees.

(c) In determining the total hours worked, the employer must include all time the employee is required to be on the premises or on duty and all time the employee is suffered or permitted to work. Special rules for live-in domestic service employees are set forth in § 552.102.

§ 552.102 Live-in domestic service employees.

(a) Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day. However, section 13(b)(21) provides an exemption from the Act's overtime requirements for domestic service employees who reside in the household where employed. But this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. See regulations Part 785, § 785.23.

(b) Where there is a reasonable agreement, as indicated in (a) above, it may be used to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. The employer shall keep a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If it is found by the parties that there is a significant deviation from the initial agreement, a separate record should be kept for that period or a new agreement should be reached that reflects the actual facts.

§ 552.103 Babysitting services in general.

The term "babysitting services" is defined in § 552.4. Babysitting is a form of domestic service, and babysitters other than those working on a casual basis are entitled to the same benefits under the Act as other domestic service employees.

§ 552.104 Babysitting services performed on a casual basis.

(a) Employees performing babysitting services on a casual basis, as defined in § 552.5 are excluded from the minimum wage and overtime provisions of the Act. The rationale for this exclusion is that such persons are usually not dependent upon the income from rendering such services for their livelihood. Such services are often provided by (1) Teenagers during non-school hours or for a short period after completing high school but prior to entering other employment as a vocation, or (2) older persons whose main source of livelihood is from other means.

(b) Employment in babysitting services would usually be on a "casual basis," whether performed for one or more employees, if such employment by all such employers does not exceed 20 hours per week in the aggregate. Employment in excess of these hours may still be on a "casual basis" if the excessive hours of employment are without regularity or are for irregular or intermittent periods. Employment in babysitting services shall also be deemed to be on a "casual basis" (regardless of the number of weekly hours worked by the babysitter) in the case of individuals whose vocations are not domestic service who accompany families for a vacation period to take care of the children if the duration of such employment does not exceed 6 weeks.

(c) If the individual performing babysitting services on a "casual basis" devotes more than 20 percent of his or her time to household work during a babysitting assignment, the

exemption for "babysitting services on a casual basis" does not apply during that assignment and the individual must be paid in accordance with the Act's minimum wage and overtime requirements. This does not affect the application of the exemption for previous or subsequent babysitting assignments where the 20 percent tolerance is not exceeded.

(d) Individuals who engage in babysitting as a full-time occupation are not employed on a "casual basis."

§ 552.105 Individuals performing babysitting services in their own homes.

(a) It is clear from the legislative history that the Act's new coverage of domestic service employees is limited to those persons who perform such services in or about the private household of the employer. Accordingly, if such services are performed away from the employer's permanent, or temporary household there is no coverage under sections 6(f) and 7(l) of the Act. A typical example would be an individual who cares for the children of others in her own home. This type of operation, however, could, depending on the particular facts, qualify as a preschool or day care center and thus be covered under section 3(s)(1)(B) of the Act in which case the person providing the service would be required to comply with the applicable provisions of the Act.

(b) An individual in a local neighborhood who takes four or five children into his or her home, which is operated as a day care home, and who does not have more than one employee or whose only employees are members of that individual's immediate family is not covered by the Fair Labor Standards Act.

§ 552.106 Companionship services for the aged or infirm.

The term "companionship services for the aged or infirm" is defined in § 552.6. Persons who provide care and protection for babies and young children, who are not physically or

mentally infirm, are considered babysitters, not companions. The companion must perform the services with respect to the aged or infirm persons and not generally to other persons. The "casual" limitation does not apply to companion services.

§ 552.107 Yard maintenance workers.

Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as independent contractors who are not covered by the Act as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors.

§ 552.108 Child labor provisions.

Congress made no change in section 12 as regards domestic service employees. Accordingly, the child labor provisions of the Act do not apply unless the underaged minor (a) is individually engaged in commerce or in the production of goods for commerce, or (b) is employed by an enterprise meeting the coverage tests of sections 3(r) and 3(s)(1) of the Act, or (c) is employed in or about a home where work in the production of goods for commerce is performed.

§ 552.109 Third party employment.

(a) Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). Assigning such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during

each assignment come within the definition of companionship services.

(b) Employees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a "casual basis" for purposes of the section 13(a)(15) exemption. Such employees are engaged in this occupation as a vocation.

(c) Live-in domestic service employees who are employed by an employer or agency other than the family or household using their services are exempt from the Act's overtime requirements by virtue of section 13(b)(21). This exemption, however, will not apply where the employee works only temporarily for any one family or household, since that employee would not be "residing" on the premises of such family or household.

§ 552.110 Recordkeeping requirements.

(a) The general recordkeeping regulations are found in part 516 of this chapter and they require that every employer having covered domestic service employees shall keep records which show for each such employee: (1) Name in full, (2) social security number, (3) address in full, including zip code, (4) total hours worked each week by the employee for the employer, (5) total cash wages paid each week to the employee by the employer, (6) weekly sums claimed by the employer for board, lodging or other facilities, and (7) extra pay for weekly hours worked in excess of 40 by the employee for the employer. No particular form of records is required, so long as the above information is recorded and the record is maintained and preserved for a period of 3 years.

(b) In the case of an employee who resides on the premises, records of the actual hours worked are not required. Instead, the employer may maintain a copy of the agreement referred

to in § 552.102. The more limited recordkeeping requirement provided by this subsection does not apply to third party employers. No records are required for casual babysitters.

(c) Where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may: (1) Indicate by check marks, statement or other method that such hours were actually worked, and (2) when more or less than the scheduled hours are worked, show the exact number of hours worked.

(d) The employer may require the domestic service employee to record the hours worked and submit such record to the employer.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

COKE,

v.

LONG ISLAND CARE AT HOME, *et al.*

DECLARATION OF MARYANN OSBORNE

MARYANN OSBORNE, pursuant to 28 U.S.C. § 1746, and subject to the penalties of perjury, declares as follows:

1. I am a defendant-appellee in the above-captioned appeal and vice president of Long Island Care at Home, Ltd. ("LICAH"), also a defendant-appellee herein (collectively, "Defendants"). I make this declaration in support of Defendants' motion to stay this Court's mandate for ninety (90) days pending Defendants' application for certiorari review in the Supreme Court of the United States. The information contained in this declaration is based upon the personal knowledge I have acquired as an officer of LICAH.

2. LICAH employs approximately forty (40) home health care aides, who provide companionship services to approximately thirty (30) homebound patients.

3. Pursuant to the exemption from federal overtime wage and hour requirements permitted by 29 C.F.R. § 552.119(a), LICAH currently pays its home health care aides $8.00 per hour for an average 70-hour work week. Thus, on average, LICAH home health care aides earn approximately $560.00 per week.

4. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for LICAH employees and clients.

5. Given current limitations on government reimbursement for Medicaid patients receiving home health care companionship services, LICAH's existing business plan will result in tremendous and unsustainable losses to the company if LICAH is obligated to comply with federal overtime wage and hour requirements.

6. Thus, in order to comply with federal law while also avoiding such losses, LICAH will be forced to limit each employee's total work schedule to forty (40) hours per week, thereby avoiding higher overtime pay rates, and/or to reduce each employee's hourly wage. As a consequence, most employees will likely suffer an average 43% weekly salary reduction—or, stated differently, most LICAH home health care aides will be limited to earning $320.00 per week rather than their current $560.00 per week.

7. LICAH's homebound elderly and infirm clients will also suffer the brunt of this Court's ruling. Because it will be economically prohibitive for LICAH to assign any one home health care aide to work with a patient for more than forty (40) hours per week, the majority of patients will have to accept multiple aides entering their homes. Indeed, depending on a given patient's needs and certain reimbursement conditions, the circumstances may require assigning as many as three or more home health care aides each week to assist a client.

8. In my experience, assigning multiple home health care aides to individual patients creates a serious hardship for the patients and their families. The presence of multiple care providers in a home is often very stressful for elderly and infirm individuals. The relationship

between home health care aides and their patients is often intimate and grounded in a trust that builds over time. Because of their physical and mental conditions, many elderly and infirm patients suffer from heightened fearfulness, and they find it extremely difficult to acclimate to different care providers. This troubling dynamic often assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being.

9. Coordinating the presence of multiple care providers in a single home also often imposes a difficult burden on the patient's family members. Numerous shift changes during the day raises the likelihood that gaps in care may occur between shifts—requiring family members to fill in for a missing home health care aide or to leave the patient unattended. When family members are unwilling or physically unable to step in, or are prevented from supplying the necessary care because of other family-related demands or work, serious problem can arise. Moreover, in my experience, home health care aides who are assigned shorter shifts, and therefore stand to earn less for each client visit than those aides who are assigned longer hours with an individual, have a lesser economic incentive to be reliable and dedicated to their patients.

10. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

January 14, 2005 /s/ Maryann Osborne
MARYANN OSBORNE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,
—against—
LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Defendants-Appellees.

DECLARATION IN SUPPORT OF MOTION

ROXANNE TENA-NELSON declares the following:

1. I am vice president of the Continuing Care Leadership Coalition, Inc. ("CCLC"), a non-party that has a strong interest in this case, because compliance with the Court's decision, upon issuance of the mandate, will have serious negative implications for not-for-profit continuing care providers in New York. I am the attorney who previously submitted a motion for leave to file an amicus curiae brief, on behalf of CCLC, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. CCLC represents the interests of over 100 not-for-profit and public organizations providing long term care services in metropolitan New York and beyond. Our membership includes forty-three (43) mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals in their homes. The remainder of our membership relies heavily on the existing home care system in order to provide a full range of long term care services to older and disabled individuals.

3. As charitable, not-for-profit providers obligated to serve their local areas, CCLC's members have a unique commitment to their religious or community-focused missions, strict accountability to their boards and to their communities, and an extensive record of innovation in caring for patients. Our mission-driven members are not focused on creating a bottom-line profit, but rather they reinvest in new services and assist their communities with service enhancements.

4. This declaration is submitted in support of Defendants-Appellees' motion to stay this Court's mandate for ninety (90) days pending Defendants-Appellees' application for certiorari review in the Supreme Court of the United States. Compliance with this Court's decision, upon issuance of the mandate, will have serious negative impact on the access and quality of care for the tens of thousands of older and disabled individuals receiving services through our member organizations based upon significant increased costs for home care services, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement.

5. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for CCLC members and patients by increasing expenses for other components of New York State's long term care system, which heavily relies on home care services. The resulting disruption in the continuum of care will negatively affect patients receiving and seeking health services.

IMPLICATIONS OF COMPLIANCE WITH THIS COURT'S DECISION

6. The Court's decision will destabilize New York State's overall long term care system, will diminish labor-management achievements in the metropolitan New York area, will hinder the broader health care system, and will under-

mine the State's commitment to supporting care of older and disabled individuals at home and in the community.

A. Impact on the Overall Long Term Care System

7. New York's long term care system provides a broad range of options for older and disabled individuals either to receive services at nursing facilities or to live in the community with supportive services. Unfortunately, long term care providers in New York and throughout the nation rely heavily on governmental payments that do not reflect current health care costs. Because CCLC's members are not-for-profit providers, they are particularly committed to serving the low-income population, a large portion who receive services through Medicaid. Based on CCLC's analysis of 2002 audited financial statements, CCLC has determined that over half of the long term care providers in New York are losing money. Of these financially distressed organizations, a substantial percentage operate home health agencies and thus would be subject to additional financial hardship should the Court's decision stand. These financial strains would compound existing cost pressures associated with expected cuts to the Medicaid system, an increasingly burdensome set of regulatory requirements, a variety of workforce challenges, and resource intensive quality improvement initiatives.

8. In addition, the Court's decision will disrupt other components of the long term care system that rely on home health care services, such as adult day health care, long term home health care or "nursing home without walls" program, senior housing, and managed long term care—a capitated plan that allows nursing home certifiable individuals remain at home with supportive services.

B. Impact on the Labor-Management Achievements

9. This Court's decision will hinder the monumental strides made during the recent labor-management bargaining process in the metropolitan New York area. Long term care providers

share an interest in paying home care workers a reasonable wage and benefit package in order to retain talented staff. Home care agencies and home care workers have made progress toward achieving important wage and benefit increases, reflected in recent labor negotiations. However, the Court's decision will significantly disrupt the progress of recognizing the common need for a reasonable wage and benefit package and undermine achievements made between labor and management.

C. Impact on the Broader Health Care System

10. The Court's decision will also obstruct the flow of health care delivery between hospitals and home health care agencies, particularly for individuals in New York City that are discharged from the hospital to a home health agency through The Bridge Program, expedited hospital discharge program that allows hospital patients to be discharged to home health agencies rather than lingering in the hospital setting. By creating disruptions in the continuity of care provided by home health agencies, the Court's decision impairs the ability of hospitals to discharge patients to more appropriate home and community settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of 2002 audited financial statements, CCLC estimates that a one day increase in the length of stay for patients in New York hospitals that are discharged to home health agencies would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, an additional day will increase costs to hospitals, the State, local governments, the federal government, and the workers' compensation system, and will result in less access to hospital beds for patients who need them.

D. Impact on New York's Commitment to Home Care as a Vital Service

11. The Court's decision will undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a core element of our long term care system, New York has continued its commitment to offering services in the least restrictive setting by supporting its home and community-based services programs. New York's commitment to home care is consistent with the U.S. Supreme Court's *Olmstead* decision, which found that state and public agencies must make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The generous mix of home and community-based programs available to older and disabled people has helped over 121,000 older New Yorkers, 76% of whom are in the New York City region, continue to live in the community with the needed supports.

CONCLUSION

12. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

WHEREFORE, it is respectfully submitted that Defendants-Appellees' motion for an order to staying the mandate the filing of a petition of a writ of certiorari in the U.S. Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 14, 2005.

January 14, 2005 /s/ Roxanne Tena-Nelson

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,
—against—
LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Defendants-Appellees.

DECLARATION IN SUPPORT OF MOTION

SUSAN CHOI-HAUSMAN declares the following:

1. I am of counsel to MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, a non-party that has a strong interest in this case, because compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid-funded personal care services program. I am an Assistant Corporation Counsel in the Appeals Division of the Office of the Corporation Counsel and the attorney who previously submitted a motion for leave to file an amicus brief, on behalf of the City of New York, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. I am familiar with the facts contained in this affirmation, based on information received from the First Assistant Deputy Commissioner of the Home Care Services Program at the City's Human Resources Administration ("HRA"), which oversees the Medicaid-funded program that provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually,

through the use of approximately 60,000 personal care aides, commonly referred to as home attendants.

3. This affirmation is submitted in support of defendants-appellees' motion to stay the mandate. Compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid funded program, in both economic and noneconomic terms for everyone involved in the program, including the government, the home attendants, and individuals receiving personal care services. Additionally, as outlined in the defendants-appellees' motion papers, the certiorari petition to the Supreme Court will present a substantial question, including a split in the Circuits on an important federal issue. Given the important public interests involved, including the ramifications for the City's Medicaid-funded program upon compliance with this Court's decision, and the ensuing chaos in the program if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court, there is good cause for a stay. Therefore, it is respectfully requested that this Court stay the mandate, pending the filing of a petition for a writ of certiorari in the Supreme Court.

OVERVIEW OF THE CITY'S INVOLVEMENT IN THE PROVISION OF PERSONAL CARE SERVICES

4. The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

5. New York City residents include a large number of low-income frail elderly and disabled individuals, many of whom live alone. New York City has been instrumental in the development of a Medicaid-funded program to provide personal care services under which Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring, walking and nutrition) when these services are medically needed to allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of personal care service to be provided to Medicaid clients is the responsibility of HRA.

6. Authorized Medicaid-funded services are delivered through contracts with over 90 provider agencies throughout the City. Medicaid clients may be authorized to receive personal care services for periods of time ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client s family.

7. At the present time, the annual cost to the Medicaid program of personal care service in New York City is approximately $1.6 billion. This amount covers care provided to approximately 50,000 individuals annually by about 60,000 home attendants. There are a number of other modalities under which care is provided to Medicaid-eligible individuals in the home, but the City's oversight responsibility is limited to personal care services, which are discussed here.

RAMIFICATIONS OF COMPLIANCE WITH THIS COURT'S DECISION

8. Compliance with this Court's decision, upon issuance of the mandate, will have serious implications for the Medicaid-funded personal care service program administered by the City. Compliance with this Court's decision is expected to increase the cost of the program and required Medicaid funding by over $263 million per year. While this cost arguably could be somewhat limited by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple home attendants providing care to a client, without jeopardizing the client's welfare.

Economic Implications

9. This Court's decision is estimated to increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $263 million annually. New York City's Medicaid funding will need to increase from $1.592 billion to about $1.855 billion annually in order to sustain its current client service levels. As set forth below, the estimated additional $263 million annual cost consists of: (a) overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (b) an increase in billable and overtime hours for 24 hour daily care provided by "sleep-in" home attendants; and (c) travel time, which will now have to be paid to attendants who serve more than one client and travel between cases.

a. Paid Overtime

10. The City currently authorizes the delivery of approximately 105,777,000 hours of service annually to approximately 42,000 personal care service clients. Services to most of these clients are rendered by not-forprofit providers

operating under the third-party employer exemption invalidated by this Court. New York City's HRA staff estimates that approximately 19% (20,098,000) of the personal care service hours provided in City Fiscal Year 2004 were provided by attendants working in excess of 40 hours weekly.

11. These hours would be subject to overtime pay if this Court's decision is upheld. The estimated incremental cost of overtime for the 20 million hours is approximately $102.9 million annually.

b. "Sleep-In" Cases

12. Among the innovations developed by the City to facilitate delivery of personal care services to its frail and vulnerable residents is a service modality known as "sleep-in" service. Under this approach, a home attendant stays with a client for a 24-hour period, during which time the attendant is on paid duty for 12 hours, and is off duty for the remaining 12 hours, and is provided with sleeping accommodations during this time. The "sleep-in" attendant may be roused up to three times during the unpaid hours, and so is available to assist the client with special needs, such as toileting or turning, during the night-time hours. Typically these services are provided by two home attendants during the week—one of whom stays with the client for five 24-hour periods, and the other for the remaining two. This program is well accepted by both clients and home attendants, and reflects the close relationship that is appropriately developed between them.

13. The City currently has 5,033 clients who receive 24 hour daily care from home attendants who "sleep-in". These sleep-in home attendants are present 24 hours daily and receive an hourly wage for each of 12 hours; they are not compensated for the 12 hour "sleep-in" portion of the day but, rather, receive a daily shift differential. Provider agencies are authorized to bill Medicaid for 84 hours weekly (12 hours daily x 7 days) for these cases.

14. Upon compliance with this Court's decision, the non-paid "sleep-in" hours would be limited to 8 hours daily under the Fair Labor Standards Act ("FLSA"). *See* 29 C.F.R. §785.22 (explaining generally that, where an employee is required to be on duty for 24 hours or more, a bona fide sleeping period of not more than 8 hours may be excluded from hours worked and that interruptions of sleep by a call to duty must be counted as hours worked). Accordingly, the provider agency service payment authorization for these cases would have to be increased from 12 to at least 16 hours daily. These additional 4 hours daily for 5,033 cases will increase the billable hours for the City's contracted home attendant provider agencies by 7,348,180 hours annually, with a resulting additional annual cost to the government of approximately $112 million for straight-time service.

15. Further, the additional paid hours on these sleep-in cases will also have an overtime impact since the home attendants presently servicing these cases are already working hours that would be subject to overtime pay, upon compliance with this Court's ruling. Accordingly, the 7 million additional hours subject to wages on the sleep-in cases will also be subject to paid overtime. The cost of the overtime (i.e., the additional one-half-time cost) for these 7 million hours is about $37.6 million annually.

c. Travel Time

16. The City's Medicaid-funded personal care service program includes approximately 12,300 clients who receive an average of 21 hours of service weekly. Many of the home attendants service more than one of these cases in order to earn a full-time wage.

17. Presently, home attendants' wages are limited to hours actually worked; the home attendant is not paid for the time spent traveling between cases. Upon compliance with this Court's decision, the time spent in transit by these employees

will be subject to wages under the FLSA. *See* 29 C.F.R. §785.38 (explaining generally that travel time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the work day, must be counted as hours worked). The City's HRA staff conservatively estimates the annual cost to government as about $11.4 million.

18. In short, the economic impact of this Court's decision is tremendous, and will require a renegotiation of the contracts with the over 90 different provider agencies throughout the City, which actually provide the services.

Limitations on Frequent Change of Attendants

19. It might be argued that some of the costs outlined above could be avoided by limiting the hours of service currently provided to an individual client by a home attendant to a maximum of 40 hours per week. However, there are substantive reasons why this is not readily doable. The relationship between a home attendant and the client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below:

a. Privacy in the Home

20. Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for the home attendant to build a trusting personal relationship with the client, as otherwise the atten-

dant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

21. Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

b. Continuity of Care

22. Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is comfortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

c. Family Compatibility

23. In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client.

24. In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, prevent the provision of additional home attendants for each client currently receiving personal care services, in order to keep costs down. As to clients newly entering the Medicaid-funded personal care services program, changes in the provision of personal care services, such as the provision of additional home attendants, may be required, in order to keep costs down.

CONCLUSION

25. In conclusion, complying with this Court's decision, upon issuance of the mandate, will have serious ramifications, in terms of both cost and the provision of care, for the entities and individuals involved in the City's Medicaid-funded personal care services program. There is good cause for a stay of the mandate, in light of: (1) the ramifications to the City's program; (2) the fact that the certiorari petition to the Supreme Court will present a substantial question, including a

split in the Circuits on an important federal issue; and (3) and the ensuing chaos in the City's program—including another change in the renegotiated provider contracts and the disruption in the lives of individuals newly receiving personal care services—if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court.

WHEREFORE, it is respectfully submitted that defendants-appellees' motion for an order staying the mandate pending the filing of a petition of a writ of certiorari in the Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 13, 2005.

/s/ Susan Choi-Hausman
SUSAN CHOI-HAUSMAN
Tel. (212) 788-1159 or 1065

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,
—against—
LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,
Defendants-Appellees.

DECLARATION OF CAROL RODAT IN SUPPORT OF MOTION OF DEFENDANTS-APPELLEES LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE FOR A STAY OF THE MANDATE

Carol Rodat, under penalty of perjury, hereby declares as follows:

1. I am the president of the Home Care Association of New York State, Inc. (HCA). I make this declaration in support of the motion by Defendants-Appellees Long Island Care at Home, Ltd. and Maryann Osbome for a stay of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court.

2. The HCA is a not-for-profit organization that works to promote and support high-quality, cost-effective home care and community services for the citizens of New York State. HCA is an active participant in public policy discussions and legislative initiatives involving home health care services. HCA's membership encompasses approximately 250 home care provider agencies, including primarily non-profit and governmental organizations as well as some for-profit agen-

cies. Collectively, HCA's members serve the majority of Medicare and Medicaid beneficiaries who require home care services in New York.

3. Based on my first-hand knowledge as President of HCA, I believe that the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State.

4. The budgets of HCA's provider members are severely constrained. Most providers depend on some form of government reimbursement (Medicare and predominantly Medicaid) for the home health care services they provide to the elderly and infirm.[1] Medicaid reimbursement rates are calculated based upon cost report data from two years prior and are adjusted using the national Consumer Price Index.[2] As a result, reimbursement rates for home health care costs do not generally reflect current health care costs.

5. This situation is exacerbated by the fact that government spending on home health care has *decreased* during the last decade.[3] Such spending is likely to remain severely constrained despite the growing demand and need for home health care services.[4]

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[1] *Cf.* Policy Brief, Long-Term Care: Medicaid's Role and Challenges 6 (Prepared for the Kaiser Commission on Medicaid and the Uninsured, Nov. 1999), *http://www.kforg/medicaid/loader.cfin?cfin?url=/commonspot/security/getfile.cfin&PageID=13448* (most longterm care is financed by Medicaid program).

[2] *See* N.Y. Pub. Health Law § 3614 (Consol. 2004). In addition, New York State caps the administrative and general costs of all certified home health agencies at the statewide average.

[3] *See* Ex. A (Setting the Record Straight: A Response to 'The Plight of New York's Home Health Aides' 1-2 (2004).

[4] *See, e.g.*, Jennifer Steinhauer, New York, Which Made Medicaid Big, Looks to Cut It Back, N.Y. Times, Mar. 3, 2003, at B1 (New York State

6. Given the limited public financial resources available for home health care, provider agencies face significant financial constraints. Their budgets cannot bear the cost of compliance with the Panel's holding without additional revenues from external sources, which are unlikely to be forthcoming.[5]

7. If required to comply with federal wage requirements for companionship services without such additional funding, providers would be forced to implement measures that seriously disadvantage their home care patients.

8. Given providers' inability to fund any increased overtime, they would have to staff home companion cases on shorter shifts in order to avoid those overtime costs. The limited supply of workers willing to take such short shifts would almost undoubtedly result in uncovered hours. As a result, home care patients would either be denied some periods of care or receive care with less continuity.[6] Many

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considering Medicaid a target for budget cuts); *cf.* U.S. Dept. of Health and Human Services, Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs 11 (Feb. 2004),ftp://ftp.hrsa.gov/*bhpr/national center/RNandHomeAides.pdf. at* 8 (despite major cuts in Medicare funding, the Bureau of Labor Statistics predicts that home health aides and personal aides will increase by 62% by 2010).

[5] *See* Ex. B (Letter from Senator Christopher S. Bond, Chairman of the United States Senate Committee on Small Business, to Thomas M. Markey, Acting Administrator, Wage and Hour Division, U.S. Dept. of Labor at 3 (July 26, 2001) (costs of eliminating the third-party employer exemption outweigh any perceived benefits); Ex. C (Letter from Thomas Hamilton, U.S. Dept. of Health and Human Services, to T. Michael Kerr, Administrator, Wage and Hour Division, U.S. Dept. of Labor at 1 (Mar. 20, 2001) (doing away with the third-party employer exemption would cause a dramatic increase in needed Medicaid program expenditures).

[6] For those New York State home care patients who pay for companionship services outof-pocket, the stakes are just as high. If employer agencies pass on the increased costs of wages, patients may be forced to forego services altogether or, at a minimum, to reduce the services they currently receive and require. *See McCune v. Oregon Senior Servs. Div.*,

patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services.

9. Home care workers will also themselves be harmed if HCA's provider members are forced to eliminate or shorten shifts. Home health workers who staff cases requiring companionship services depend upon the wages and benefits that result from the hours that they work. Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.

10. In short, eliminating the third-party employer exception will effect a massive disruption to the delicately balanced system that makes home care—a desired alternative to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Carol A. Rodat
CAROL RODAT

Executed on: January 14, 2005

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894 F.2d 1107, 1110 (9th Cir. 1990); Joshua M. Wiener et al., *Catastrophic Costs of Long-Term Care for Elderly Americans*, in Persons with Disabilities: Issues in Health Care Financing and Service Delivery 182 (Joshua M. Wiener et al., eds., 1995).

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Supreme Court, U.S.
FILED
DEC 15 2006
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No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Is the Department of Labor's "Interpretation" of the Fair Labor Standards Act, codified at 29 C.F.R. § 552.109(a), providing that employees who are employed in domestic service employment to provide companionship services, but who are employed by entities other than the individual, family or household using their services, are exempt from the Act's minimum wage and overtime requirements under the Act's companionship exemption, 29 U.S.C. § 213(a)(15), entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

2. Granting 29 C.F.R. § 552.109(a) the deference it is due under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944), should the federal courts apply the Department of Labor's interpretation of the Fair Labor Standards Act's companionship exemption, 29 U.S.C. § 213(a)(15), embodied in the regulation?

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STATEMENT OF THE CASE

Petitioners failed to file a brief in the Court of Appeals prior to the Court's original decision.

Both decisions below, written by Chief Judge Walker, were unanimous and no judge on the Court of Appeals requested that a vote be taken on the petition for rehearing *en banc*. la-6a, 7a-32a; Pet., No. 04-1315, 31a-32a.

ARGUMENTS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS

Petitioners do not actually argue there is a split in the Circuits created by the Tenth Circuit in *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004), and *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2001), *cert. denied*, 531 U.S. 1072 (2001).[1] Petitioners' reluctance to argue there is a split is well founded for three reasons.[2]

First, in both its decisions, the Tenth Circuit's discussion of the issue of whether 29 C.F.R. § 552.109(a) (the third-party employer regulation) should be followed is *dicta*. In *Johnston*, the Tenth Circuit held that the employees at issue were not employed in a "private home" under 29 C.F.R. § 552.3, thus, were not engaged in "domestic service employment," and, therefore, did not fall within the companionship exemption. 213 F.3d at 562-66. The Court's cursory discussion of whether employees of a third-party

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[1] Even if there were an actual split among the Circuits, the need for uniformity in this area is substantially diminished by the fact that parallel state wage and hour laws exist which are *not* uniform in their treatment of companions. *See infra* at 5.

[2] In fact, on the first question posed by Petitioners—whether Department of Labor (DOL) interpretations of statutory exemptions to the Fair Labor Standards Act (FLSA)—all of which are embodied in regulations—are entitled to *Chevron* deference, the courts of appeal are in complete harmony. *See infra* at 15.

employer *could* fall within the companionship exemption *if* they were employed in a private home is therefore *dicta*. The question of whether the employees were employed in a private home was also the only question at issue in *Welding*: "Whether Bios is exempt from paying overtime to any of the plaintiffs here depends on whether any of the residences in which plaintiffs provided services to developmentally disabled individual should be considered 'private homes.'" 353 F.3d at 1218. It does not appear from the decision that the employees even argued that the exemption did not apply because their employer was a third party. *See id.* at 1217 n.3.

Second, as the Second Circuit noted, the Tenth Circuit's *Johnston* holding predates this Court's holding in *United States v. Mead Corp.*, 533 U.S. 218 (2001). 25a. Petitioners note that *Welding* post-dates *Mead*, but the later decision relies solely on *Johnston* to support its *dicta*, 353 F.3d at 1217 n.3, not even citing *Mead*. The Second Circuit followed *Mead in* denying the regulation *Chevron* deference. For this reason too, the decisions do not conflict.

Finally, the Tenth Circuit holdings in no way present this Court with the type of fully analyzed and considered conflict among circuits that is a precondition of review. *Johnston* merely contains conclusions devoid of analysis. *In full*, the Tenth Circuit's holding states the following concerning the questions at issue:

> In § 213(a)(15), Congress expressly left it to the Secretary of Labor to define and delimit the terms in the statute by regulation. The Supreme Court has instructed that courts must defer to a federal agency's interpretation of a statute unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron* . . . . The contention that the exception does not apply to domestic services employees who are not employed directly by an individual in need of care, or his or her family has been rejected by the courts that

> have been confronted with the same question. . . [3]We are persuaded that the secretary's interpretation is not arbitrary, capricious, or manifestly contrary to § 213(a)(15).

213 F.3d at 562. *Welding,* in turn, merely cites *Johnston. See* 353 F.3d at 1217 n.3. Thus, the Second Circuit was (and still is) correct when it observed "that none of these prior cases carefully considered the question before us now." 25a.

Permitting further circuit court adjudication in this area would be prudent because, contrary to Petitioners' assertion that the Second Circuit's decision disrupts 30 years of employer reliance on the regulation, the issue is actually of recent vintage because the homecare industry is of recent vintage. As the DOL explained in proposing revisions to the companionship regulations in 2001, "[t]he home care industry has changed dramatically since the Department published the 1975 regulations." 66 Fed. Reg. 5483 (Jan. 19, 2001). The combination of a growing demand for long-term care, consumer preference for and social policy in favor of in-home care, and expanded Medicaid and Medicare coverage of such care has led to dramatic, *recent* growth in the number of third-party agencies employing homecare workers and the number of such workers (which tripled between 1988 and

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[3] The Tenth Circuit here cited footnotes in two District Court decisions, *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299 n.2 (N.D.Okla. 1998), and *Madison v. Resources for Human Development, Inc.*, 39 F.Supp.2d 542, 545 n.3 (E.D.Pa. 1999), *vacated on other grounds*, 233 F.3d 175 (3d Cir. 2000). In *Terwilliger*, it does not appear that the plaintiff argued that the regulation was not entitled to *Chevron* deference or that it was invalid. Similarly, the footnote in *Madison* does not suggest that the validity of the regulation was even at issue. The Court simply cites the regulation and states that the fact that the plaintiffs are employed by a third party "does not exclude them from the exemption." 39 F.Supp.2d at 545 n.3. Moreover, as in *Johnston*, the statement is *dicta* as the Court held that the employees were not exempt because they did not work in a private home. *Id.* at 545-48.

1998). *Id.* Thus, the question addressed by the Second Circuit has, as a practical matter, only arisen in the last few years and other courts of appeal should be given an opportunity to consider it before this Court determines whether review is necessary.[4]

II. THIS CASE DOES NOT RAISE ISSUES OF EXCEPTIONAL IMPORTANCE

Petitioners argue that this case is of exceptional importance because it would be expensive for third-party employers of unskilled workers,[5] performing often physically and emotionally demanding work for elderly and disabled people in their homes, heavily subsidized by federal and state government, to comply with the minimum labor standards Congress established in the FLSA. In 1937, however, President Roosevelt explained that embodied in the Act "are a few rudimentary standards of which we may properly ask general and widespread observance." S. REP. NO. 884, 75th Cong., 1st Sess. 3 (1937). "Failure to observe them," Roosevelt continued, "must be regarded as socially and economically oppressive and unwarranted under almost any circumstances." *Id.* While the FLSA contains a limited number of specific exemptions, additional payroll costs cannot be a reason for broadly construing them because Congress obviously understood that compliance with the Act would cost employers money and yet this Court has repeatedly held that the Act's exemptions must "be narrowly construed." *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Nevertheless, Petitioners and their amici argue that this Court

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[4] The question is currently pending before both the Eleventh and Fifth Circuits in *Florida Habilitation Network, Inc. v. Buckner*, No. 06-11032-EE (11th Cir.) (argued November 6, 2006); *Fernandez v. Elder Care Option, Inc.*, No. 05-16806-A (11th Cir.) (stayed pending a decision in *Buckner*); and *Cook v. Hayes*, No. 06-30856 (5th Cir.)

[5] Petitioner Long Island Care at Home, for example, employs approximately 40 homecare (and possibly other) workers. 84a ¶ 2.

should grant review because, if third-party employers are required to comply with the FLSA, they will seek to avoid increased costs by reducing workers' hours, thereby harming the aged and disabled people cared for by the workers. The Court should reject this argument for five reasons.

First, the experience under state wage and hour laws covering companions[6] belies predictions of "serious dislocation of care" advanced by Petitioners and their amici. Pet. at 13. Many states require third-party employers of companions to pay minimum wages and premium pay for overtime. *See, e.g.*, 7 Colo. Code Regs. § 1103-1(5); 820 Ill. Comp. Stat. 105/3(d) and 111. Admin. Code tit. 56, § 210.100; Kan. Stat. § 44-1202(e)(2) and Kan. Admin. Regs § 49-30-1(h); Mich. Comp. Laws § 408.394(14)(2)(a); Minn. Stat. § 177.23(11); Mont. Code § 39-3-406; Nev. Rev. Stat. §§ 608.018(3)(a), .250(2)(b); Pa. Stat. tit. 43, § 333.105(a)(2) and 34 Pa. Code § 231.1(b); Wash. Rev. Code § 49.010(5)(b); Wis. Admin. Code § 274.015. Indeed, because the states' power to regulate economic relations not touching interstate commerce is not limited by the commerce clause (unlike federal power), many state wage and hour laws do not treat domestic service differently than other employment and thus contain no companionship exemption. *See, e.g.* Mass. Gen. Laws ch. 151, §§ 1-3 and Opinion Letter MW-2002-020, Mass. Dept. of Labor, Div. of Occupational Safety, available at www.mass.gov/dos/mw_docs/mw-2002-020.htm (July 19, 2002); N.J. Stat. § 34:11-56a4; W.Va. Code §§ 21-5C-1 *et seq.* It simply cannot be the case that employers in Illinois, Colorado and elsewhere can pay companions a minimum wage and premium pay for overtime while in New York respecting such minimum standards "threaten[s] a serious dislocation of care." In fact, even in New York, while state law incorporates FLSA exemptions, exempt employees must

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[6] The FLSA expressly does not preempt more inclusive or protective state laws. *See* 29 U.S.C. § 218(a).

still be paid one and one-half times the minimum wage[7] for overtime. *See* N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2. There is no evidence that these state law requirements—which parallel requirements under the Second Circuit's decision—have disrupted homecare delivery or placed homecare outside the financial reach of any consumers.

Second, provision of companionship services, specifically those provided by Petitioners, is heavily subsidized by federal and state governments under Medicaid and other programs,[8] and these governments can and, in some cases, must adjust reimbursement rates to enable providers to comply with the FLSA. New York, for example, provides that a factor to be considered in setting personal care services[9] payment rates under Medicaid is "the applicable minimum wage laws." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(6)(ii)(d). If there is a change in the applicable wage and hour law or its construction, reimbursement rates must be adjusted to compensate for resulting increases in costs. New York specifically permits providers to request revision of reimbursement rates when the provider "has incurred new or unanticipated costs for programs or services mandated or approved by the department and . . . the cost report that the provider submitted to the department does not reflect the provider's actual costs for reasons beyond the provider's control." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(7)(iii)(c)(2).[10] In fact, the President of the New York State Association of Health

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[7] Which is higher than the federal minimum wage. *Compare id.* § 142-2.1(a) (3), (4) ($6.75 after January 1, 2006, $7.15 after January 1, 2007) *with* 29 U.S.C. § 206(a)(1) ($5.15).

[8] *See* 85a ¶ 5, 89a ¶ 7, 93a ¶2, 103a-104a ¶ 2.

[9] That is the program referenced in Petitioners' declarations. *See* 89a, 93a, 95a.

[10] None of the declarations state that this mechanism has been invoked without success after the Second Circuit's original decision on July 22, 2004.

Care Providers acknowledges that rates can "be adjusted to accommodate the higher overtime costs." Pet., No. 04-1315, 129a, ¶ 17.[11]

Third, the factual basis for this argument is not properly before this Court. Petitioners cite assertions contained in declarations filed with the Court of Appeals in support of Petitioners' Motion to Stay the Mandate and in amicus briefs, but no court has found those assertions to be true.

Moreover, Petitioners' central factual assertion—that complying with the FLSA's overtime provision will dramatically increase the cost of services—is, at best, highly exaggerated. The DOL, relying on data from the Bureau of Labor Statistics and the Department of Health and Human Services (HHS), determined in 2001 that affording minimum wage and overtime protection to homecare workers would "not produce a significant economic or budgetary impact on affected entities." 66 Fed. Reg. 5486 (Jan. 19, 2001). This conclusion was based on the facts that "more than 90 percent of the workers employed in the potentially affected occupational categories already receive the current federal minimum wage of $5.15 an hour or higher" and "most of the workers . . . do not regularly work overtime (*i.e.*, more than 40 hours per week)." *Id.* DOL specifically found that "there would be little impact from overtime wage costs if [the employees'] status was changed from exempt to non-exempt." *Id.* This finding comports with HHS funded research which points out that most states limit the number of hours of personal care services that they will fund under Medicaid and that the average limit is 4.8 hours per day. Leblanc, Tonner, and Harrington, *State Medicaid Programs Offering Personal Care Services*, 22 HEALTH CARE FINANCING REV. 155,

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[11] In regard to backpay, if the Petitioners and other employers relied in good faith on the regulation, the FLSA itself provides a defense against liability. *See* 29 U.S.C. § 259(a).

162 (2001). New York, for example, places strict limits on the number of hours of personal care services available under Medicaid, permitting a maximum of 28 hours per week absent unusual circumstances. *See* N.Y. Comp. Codes R. & Regs. tit. 18, §§ 505.14(a)(6)(i)(b), 505.14(a)(6)(ii)(b), and 505.14(a)(6)(iii)(c). Thus, the "shifting array of caregivers" Petitioners assert will be necessary to avoid overtime obligations (Pet. at 15) will not, in fact, be necessary because the vast majority of consumers nation-wide receive less than 40 hours of care per week.

Fourth, the greatest threat to the availability and quality of companionship services is not that third-party employers will be required to comply with minimum compensation standards, but rather that they will not do so and thereby further aggravate a growing shortage of homecare workers. There is already a "severe shortage" of workers and a 70% annual turn-over rate, *see* Nat'l Conference of State Legislatures, *Better Jobs Better Care: Retaining Long-Term Care Workers, 25* STATE HEALTH NOTES No. 418 at 1 (April 19, 2004), and the percentage of the population over 65 (those most in need of companionship services) is expected to double in the next 25 years. *See* Census Bureau, *65+ in the United States: 2005* at 1 (Dec. 2005). Correspondingly, home health aide is expected to be the fastest growing occupational category in the next decade. Bureau of Labor Statistics, *Occupational Employment Projections to 2014,* MONTHLY LABOR REV. 70, 75 (Nov. 2005). "The increase in demand will be occurring at a time when the supply of workers who have traditionally filled these jobs is expected to increase only slightly." HHS, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation: Report to Congress* v (May 14, 2003). The result is "apparent"—"workforce supply will become increasingly problematic." Center for California Health Workforce Studies, University of California, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for*

Geriatric Care Workers 34 (Feb. 2006). The laws of supply and demand will force Petitioners and other providers to comply with the FLSA's minimum standards and, if they do not, the resulting shortage of workers will have a much more serious adverse impact on the provision of needed care than that conjured up by Petitioners and their amici.[12]

Finally, Petitioners' argument could be made in every case involving judicial construction of a federal law with financial consequences for a class of people or entities. Every case construing police and fire exemptions to the FLSA (29 U.S.C. § 207(k)), for example, affects the finances of police and fire departments across the nation and, thus, their ability to provide essential services. But this Court cannot review every such case and, therefore, this Court has never viewed the financial impact of a decision as sufficient reason for granting review.

This case does not raise issues of exceptional importance.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

A. The Court of Appeals' Decision is Consistent with This Court's Decision in Mead

In *Mead*, this Court reaffirmed the principle that "judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*." 533 U.S. at 311. Petitioners, therefore, do not dispute the distinction drawn by the Second Circuit between types of administrative action. Rather, Petitioners argue that the Second Circuit's classi-

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[12] It was for this reason, that the AARP, the largest association of consumers of companionship services in the country, filed a brief in support of the Plaintiff when this case was remanded to the Second Circuit. *See* Brief of Amicus Curiae AARP, *Coke v. Long Island Care at Home, Inc.*, No. 03-7666 (2d Cir.)

fication of the third-party employer regulation as the type of action entitled only to *Skidmore* deference conflicts with this Court's decisions. Yet, Petitioners do not point to any specific conflict and none exists.

1. The Second Circuit's holding that the third-party employer regulation is an interpretation not entitled to *Chevron* deference was expressly based on *Mead*. *Mead* holds that in order for agency action to qualify for *Chevron* deference, (1) Congress must delegate law making authority to the agency and (2) the agency action must be pursuant to that delegation. This Court held that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. The Second Circuit expressly based its holding on the second prong of the test,[13] "*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless 'it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" 26a (quoting *Mead*, 533 U.S. at 226-27). Pursuant to the quoted language from *Mead*, the Second Circuit correctly held that the

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[13] Scholars have described *Mead's* second prong as follows: "in *Mead* the Court made clear that it is only when the agency actually employs its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1196 *(2004)*. Indeed, even prior to *Mead*, scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its contemporaneous description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose at the time it made the choice.

Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389 (1985).

regulation "does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority." 26a. The Second Circuit's decision is consistent with *Mead*.

2. Petitioners argue that *Chevron* deference is always owed agency interpretations embodied in regulations adopted after notice and comment, while admitting *Mead* held no such thing. If that was this Court's intent, however, it could easily have said so in *Mead*. *Mead* states that issuing a regulation, even by notice and comment rulemaking, is not determinative of the degree of deference owed. 533 U.S. at 230-31. This Court explained, "interpretive *rules* . . . enjoy no *Chevron* status as a class." *Id.* at 232 (emphasis added). As this Court pointed out in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), much of the "discussion . . . [in *Mead*] would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive."

No Justice of this Court and no court of appeals has ever suggested that a regulation adopted after notice and comment is always entitled to *Chevron* deference, even when the agency clearly indicated at the time of adoption that it was not invoking its "delegate[d] general authority to make rules with force of law." Surely an agency can choose both to adopt an interpretation without exercising its delegated authority to "make rules with force of law" (in order, for example, to permit greater leeway for judicial construction), and to do so after notice and comment.[14]

Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 125 S.Ct. 2688 (2005), did not involve this situation, but rather the question of whether *Chevron* deference was "foreclosed by the conflicting [earlier] construction of the [FCC] Act" by the Court of

[14] "It is within an agency's discretion to afford parties more procedure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 312-13 (1979).

Appeals. *Id.* at 2700. Nor did the colloquy between Justices Breyer and Scalia in that case address this situation. *See id.* at 2712-13, 2718-19. While Justice Scalia reads *Mead* to hold that "some unspecified degree of formal process was required - or was at least the only safe harbor," *id.* at 2718-19, he does not suggest that agencies are barred from expressly declining to exercise their delegated authority if they adopt a regulation after notice and comment.

Similarly, none of the court of appeals' decisions cited by Petitioners (Pet. at 11, 19-20) so hold. None of the decisions contain any analysis of *Mead's* second prong. In fact, *Chevron* deference was not even contested in any of the cited cases except *Alaska Department of Health and Social Services v. Centers for Medicare and Medicaid Services,* 424 F.3d 931 (9th Cir. 2005), and in that case it was *Mead's* first prong that was at issue as the Court cited "the formal administrative process afforded" a state after disapproval of amendments to its Medicaid state plan as evidence that "Congress intended" to delegate law-making authority to the Administrator. *Id.* at 939. Petitioners read too much into the uncontested restatements of *Mead's* standards in the cited cases.

Finally, even if this Court were to hold that the use of notice and comment procedure is determinative (regardless of the agency's contemporaneous intention), the Second Circuit found that the DOL's compliance with the APA's notice and comment requirements "was at best idiosyncratic and at worst insufficient" when it promulgated the third-party employer regulation. *24a. See infra* at 29. And *Chrysler* holds that "a procedural defect in the . . . regulations [—"lack of strict compliance with the APA"—]. . . precludes courts from affording them the force and effect of law." 441 U.S. at 312.

Both because the DOL expressly indicated that it was not exercising its delegated power "to make rules with force of law" when it adopted the third-party employer regulation and because the DOL's compliance with the APA was "at best

idiosyncratic," this case is not an appropriate vehicle for considering the change in the law proposed by Petitioners.

3. Petitioners' second argument is that the Second Circuit erred in applying *Mead* because the DOL intended to exercise its delegated authority when it promulgated the regulation. This is not grounds for Supreme Court review, however, as Supreme Court Rule 10 provides that "[a] writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Moreover, the Petitioners are factually wrong. The regulatory record makes clear that the DOL made a conscious choice not to exercise its delegated authority to "make rules with force of law." In 1975, when the third-party regulation was promulgated, the DOL was well aware of the distinction between substantive and interpretive regulations as well as the different degrees of deference they were accorded and the DOL knowingly and intentionally characterized the third-party employer regulation as an interpretation.[15] The distinction is embodied in the Administrative Procedures Act, 5 U.S.C. § 553(b)(3)(A) and (d)(2), adopted in 1946. The Attorney General's 1947 *Manual on the Administrative Procedure Act* made clear that only substantive rules "have the force and effect of law." *See Chrysler*, 441 U.S. at 302 n.31 (quoting *Manual* at 30 n.3). In fact, the DOL has since 1947 defined the term "interpretation" "to describe a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of

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[15] Petitioners argue that "interpretations" may satisfy *Mead's* test and thus be entitled to *Chevron* deference. While the application of *Mead* does not turn on labels, here the DOL's categorization of the third-party regulation among its "interpretations" in contrast to its "general regulations" is strong evidence that the agency did not intend to exercise its "delegated . . . authority to make rules with the force of law" for the reasons explained *infra* at 13-15.

applicable statutory language.'" 29 C.F.R. § 790.17(c). *See 29* C.F.R. Part 790 ("Source: 12 FR 7655 (Nov. 18, 1947)").

With this knowledge and express adoption of administrative law principles, DOL has, since 1949, divided its FLSA regulations into "general regulations" and "interpretations." For example, the Act's three primary exemptions are for executive, professional and administrative employees. *See* 29 U.S.C. § 213(a)(1). Since 1949, DOL has classified regulations under these exemptions as "general regulations" and "interpretations." *See* 14 Fed. Reg. 7705, Subpart A—General Regulations (Dec. 24, 1949); 14 Fed. Reg. 7730, Subpart B—Interpretations (Dec. 28, 1949); 29 C.F.R. Part 541, Subpart A—General Regulations, Subpart B—Interpretations (2004).[16]

Following this pattern, the regulations issued after the 1974 amendments were split into "General Regulations," issued pursuant to DOL's express authority to "define[] and delimit[]" the terms of the exemption, and "Interpretations." *See* 29 C.F.R. Part 552, Subparts A and B; 40 Fed. Reg. 7404, 7405, 7406 (Feb. 20, 1975). These regulations expressly state that "[t]he definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6"—*i.e. not* in § 552.109(a). 29 C.F.R. § 552.2(c). DOL classified its third-party employment regulation among its "Interpretations." *See* 29 C.F.R. Pt. 552, Subpart B, § 552.109(a). DOL's 1974 Notice of Proposed Rulemaking also clearly stated DOL's intention "to add a new 29 CFR Part 552 defining and delimiting, *in Subpart A,* the terms [used in the amendments] ..., and setting forth, *in Subpart B,* a statement of policy and

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[16] Acting after notice and comment, the DOL recently consolidated its general regulations and interpretations in Part 541, *see* 29 C.F.R. §§ 541.0 *et seq.*, in part, to "eliminate confusion regarding the appropriate level of deference to be given to the provisions." 68 Fed. Reg. 15563 (Mar. 31, 2003). Significantly, the Department has *not* taken similar action in respect to the regulations and interpretations in Part 552.

interpretation concerning the application of the Fair Labor Standards Act to domestic service employees." 39 Fed. Reg. 35382 (Oct. 1, 1974) (emphasis added). The language describing Subpart B—"a statement of policy and interpretation"—echoes *Mead's* description of "interpretations contained in policy statements" that are "beyond the *Chevron* pale." 533 U.S. at 234.[17] Thus, DOL's actions cannot be dismissed as meaningless labeling, but represent the agency's deliberate choice to specify which of its regulations were and were not adopted pursuant to its delegated law-making function. The Second Circuit thus correctly held that "the regulation at issue . . . is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15)." 26a.

The courts of appeal are in complete harmony in according the DOL's "interpretations" of the statutory exemptions only *Skidmore* deference. *See Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 642 (7th Cir. 1998); *Freeman v. Nat'l Broad. Co.*, 80 F.3d 78, 83 (2d Cir. 1996); *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.18 (3d Cir. 1994); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990). In fact, the Ninth Circuit, like the Second, cited *Mead* to support its holding that "these interpretive rules are not binding" and "enjoy no *Chevron* status." *Brigham v. Eugene Water & Electric Bd.*, 357 F.3d 931, 940 (9th Cir. 2004).[18]

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[17] In addition, the content of the regulations contained in Subpart B reflect the DOL's intention that they be used to guide administrative action, for example, § 552.100(c) and (d) announce what credits against the minimum wage "the Administrator will accept" for meals and lodging.

[18] Petitioners argue that this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), is to the contrary because it accorded *Chevron* deference to a regulation that was classified among the interpretations. But not only

Petitioners' arguments to the contrary are unconvincing. They argue that the DOL promulgated the entire set of regulations, including the third-party regulation, pursuant to its express statutory authority under § 13(a)(15), to define and delimit the terms of the exemption, and its general authority to issue regulations. But while these two statutory provisions are listed as authority for the entire set of final regulations promulgated in 40 Fed. Reg. 7404-07 (Feb. 20, 1975), *see id.* at 7405, DOL expressly indicated that the third-party regulation was not among those adopted pursuant to its authority to define and delimit the terms of the exemption. *See* 29 C.F.R. § 552.2(c); 39 Fed. Reg. 35382 (Oct. 1, 1974).[19] The citation to the general statutory authority to adopt regulations, 88 Stat. 76, § 29(b) (Apr. 8, 1974), also demonstrates nothing because an agency can promulgate either legal or interpretive regulations and here the DOL expressly categorized the third-party regulation as the latter. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C.Cir. 1993), is not to the contrary as there the Court did not refer to express reliance on a general grant of rule-making authority but rather to express reliance on statutory authority to adopt rules containing "mandatory health or safety standards." 30 U.S.C. § 811(a).

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was the degree of deference not at issue in *Auer*, *see id.* at 457; 65 F.3d 702 (8th Cir. 1995) (no discussion of *Chevron* or degree of deference), the regulation at issue, 29 C.F.R. § 541.118(a) (1996), defined a term used in the general regulations not in the Act, 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996) (each using the term "salary basis"), and was thus entitled to heightened deference as the agency's construction of its own regulation.

[19] Moreover, the notice does not state that the regulations were promulgated pursuant to the authority given DOL in § 13(a)(15) to "define[] and delimit[]" the exemption's terms, but merely cites the section as a whole. Obviously, "both legislative and interpretive rules frequently interpret the meaning of language in a statute" and thus cite the statute. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 384. Therefore, mere citation of a statute cannot render a rule legislative.

Petitioners also argue that the "nature of the rule" suggests it is legislative, citing *Chrysler*. But *Chrysler* was decided prior to *Mead* and *Chevron*, and did not involve the question of the degree of deference due agency regulations. Moreover, *Chrysler* cannot stand for the proposition asserted by Petitioners or it would reduce the category of agency actions not entitled to *Chevron* deference to a virtual null set and render the *Mead* test inoperable.[20] In fact, *Chrysler* makes clear that the fact "[t]hat an agency regulation is 'substantive' . . . does not by itself give it the 'force and effect of law.' *Id.* at 302. Rather, "the exercise of quasi-legislative authority by governmental departments . . . must be rooted in a grant of such power by the Congress." *Id.* Here, the Second Circuit correctly held that DOL did not "root" its actions in such a grant of power.

Petitioners' final argument is that the Second Circuit should have deferred to DOL's *ex post facto* characterization of the regulation in its December 2005 Advisory Memorandum. 50a-64a.[21] But the Second Circuit correctly did not accept DOL's untimely characterization for three reasons.

First, it is the DOL's contemporaneous classification of the regulation that is relevant under *Mead*, not its *post-hoc* reclassification in the Advisory Memorandum.[22] *Mead* holds that *Chevron* deference is not appropriate "where such

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[20] Far from being accepted by this Court, the test suggested by Petitioners had "been rejected by most courts" even prior to *Mead*. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 398.

[21] Petitioners do not argue that such deference is required in this regard because DOL construed its own regulation in the Advisory Memorandum and that is appropriate because the Memorandum does not in any way construe the terms of the regulation.

[22] In fact, the Memorandum does not characterize the *promulgation* of the regulation as an exercise of the DOL's delegated law-making authority, but merely states, "the Department has always treated the third part employment regulations as legally binding legislative rules." 64a.

authority [to adopt legislative rules] was not invoked." 533 U.S. at 237 (emphasis added). That is the determinative point under *Mead* and it cannot be altered by subsequent agency assertion. Scholars have described *Mead's* second prong as follows: "in *Mead* the Court made clear that it is only when the agency *actually employs* its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting, 73* FORDHAM L. REV. at 1196 (emphasis added). Indeed, even prior to *Mead,* scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its *contemporaneous* description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose *at the time it made the choice.*

Asimow, *Nonlegislative Rulemaking,* 1985 DUKE L.J. at 389 (emphasis added). In contrast, "[s]ubsequent characterization" of a regulation as legislative or interpretive should not be accorded deference. *Id.* at 390 n.40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but it would be "both unfair and disingenuous to allow the Secretary to say later that he didn't mean it. . . . [W]e are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")[23]

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[23] The cases cited by Petitioner are not to the contrary. *Am. Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000), involved the distinction between adjudication and rule making and a contemporaneous agency characterization of its action as a "Declaratory Order." *Id.* at 795. *Splane v. West,* 216 F.3d 1058, 1063 (Fed. Cir. 2000), also involved a contemporaneous characterization contained in the text of the subject interpretation itself. And *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 517 (1994), did not involve an agency's characterization of the nature of its prior action (as legislative or interpretive) at all, but rather an agency's substantive construction of its own regulation.

Second, in *Auer*, this Court made clear that "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack" is not entitled to deference. 519 U.S. at 462 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). That is exactly what the Advisory Memorandum is as demonstrated by the timing of its promulgation. On June 6, 2005, after the original petition for a writ of certiorari was filed in this case, this Court invited the Acting Solicitor General to file a brief. On December 1, 2005, the Department promulgated the Advisory Memorandum. On December 22, 2005, the Solicitor General filed the Brief of the United States, relying primarily on the Advisory Memorandum as grounds for remand. The Advisory Memorandum is "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack."[24]

Third, the Advisory Memorandum is, as its title makes clear, only advisory. It states expressly that it is intended only for *internal* guidance: "to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in [this case.]" 50a. Indeed, only staff "outside the Second Circuit" are "instructed to continue to apply the exemption" to employees of third parties. 50a. This limitation on the intended effect of the Advisory Memorandum is consistent with DOL policy which provides: "advisory interpretations announced by the Administrator [this one was announced by the Deputy Administrator] serve only to indicate the construction of the law

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[24] It appears that even the vehicle of an advisory memorandum was invented to serve strategic interests in this case. The DOL ordinarily opines on the application of the Act or its regulations through Wage and Hour Opinion Letters. The fact that the DOL rarely issues advisory memoranda is evidenced by the fact that this was the first one issued in 2005 even though it was issued on December 1. Moreover, a LEXIS search of all federal court decision reveals only one decision that mentions a DOL advisory memorandum, this Court's remand order in this case.

which will guide the Administrator in the performance of his administrative duties." 29 C.F.R. § 775.1.

The Second Circuit expressly and correctly followed this Court's decision in *Mead* in according the third-party employment regulation only that deference required by *Skidmore*.

B. The Court of Appeals' Decision is Consistent with This Court's Decision in Skidmore

Petitioners argue that the Second Circuit "refus[ed] to accord even *Skidmore* deference." Pet. at 23. But the Court of Appeals granted the regulation the deference it was due under *Skidmore*, *see* 28a-29a, and nevertheless correctly found it unpersuasive. *See* 29a-32a.[25]

In considering whether to follow DOL's interpretive, third-party regulation, the Second Circuit properly considered its "power to persuade" based on its consistency with the Act's text, its "consisten[cy] with the congressional purpose" expressed in the legislative history, its consistency with other regulations, the "consistency of the agency's position" over time, the "thoroughness evident in its consideration," and "the validity of its reasoning." *Skidmore*, 323 U.S. at 140; *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). Each factor suggests the Second Circuit correctly decided not to follow the regulation.

1. *The Regulation is Inconsistent with the Act's Text*

The FLSA does not exempt employees employed "to provide companionship services" to the elderly or infirm. Rather, it exempts only employees *"employed in domestic service employment* to provide companionship services" to

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[25] Petitioners, therefore, actually disagree merely with the Second Circuit's application of *Skidmore* which is not grounds for review under this Court's Rule 10.

the aged or infirm. 29 U.S.C. § 213(a)(15) (emphasis added). The third-party employer regulation renders the phrase "employed in domestic service employment" wholly superfluous. Congress did not intend the phrase to be meaningless. Rather, it intended it to have its ordinary meaning - employed in a household by the household. The regulation is thus inconsistent with the text of the Act.

2. *Congress Did Not Intend to Exclude Companions Employed by Third Parties*

The overall purpose of the amendments and their legislative history both demonstrate that Congress did not intend to exempt third-party employers from the minimum standards of the FLSA, allowing them, for example, to pay their employees less than the minimum wage so long as the employees provide companionship services.

Congress intended the term "domestic service employment" to encompass only employment within a home by the homeowner. The Senate Report explained that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of a person by whom he or she is employed." *2 Legislative History of the Fair Labor Standards Amendments of 1974* 1524 (1976) (S. REP. NO. 93-690, 93rd Cong., 2d Sess. 20 (1976)) (hereinafter *Legislative History). See also 2 Legislative History* 2144 (H.R. REP. NO. 93-913, 93rd Cong., 2d Sess. 35 (1974)).

Only domestics employed in the home by the home owner were even at issue when Congress adopted the exemption. The FLSA had not previously extended to such domestics employed by individuals and families because there was doubt whether they engaged in interstate commerce. Thus, the amendments expressly find that domestic service employment affects commerce. Pub.Law 93-259, §7, 88 Stat. 62 (1974)

(codified at 29 U.S.C. § 202(a)).[26] There was no such question concerning domestics employed by agencies. The pre-1974 Act already covered them. *See* 39 Fed. Reg. 35385 (Oct. 1, 1974) (DOL finding that "[employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . . [were] subject to the Act prior to the 1974 amendments.") The amendments extended coverage to domestics employed by those in whose homes they worked except if *those* domestics work as babysitters or companions. Obviously, Congress did not intend the exception to extending coverage to be broader than the extension itself.[27]

This was exactly the reasoning of the DOL when it considered the matter in the very wake of the amendments in the fall of 1974. On October 1, 1974, the DOL published a proposed interpretive regulation in the Federal Register providing, "Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such

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[26] That Congress' exclusive focus was extending the Act's coverage to domestics employed by individuals is made clear by the objection frequently expressed during floor debates that such an extension would impose an intolerable burden on "housewives." *See, e.g.*, 1 *Legislative History* at 250, 281, 727, 952, 954 (1976) (119 Cong. Rec. 18155 (June 5, 1973), 18341 (June 6, 1973), 24365 (July 17, 1973), 24797 (July 19, 1973), 24798 (July 19, 1973)) ("putting on the private individual the onus"); *2 Legislative History* 1676, 1815 (120 Cong. Rec. 4708 (Feb. 28, 1974), 5275 (Mar. 5, 1974)) ("adding additional record-keeping and other chores for the American housewife"). Echoing this theme, the Secretary of Labor's statement of opposition to the amendments made clear that he understood "domestic service" to mean "[a] household who hires a maid." *2 Legislative History* 1814 (120 Cong. Rec. 5275 (Mar. 5, 1974)).

[27] This would be true even accepting Petitioners' enterprise argument, discussed *infra* at 27-28, as previously covered companions employed by an enterprise engaged in commerce would have been rendered exempt by the exception to the extension of coverage.

services, are not exempt under section 13(a)(15) of the Act." 39 Fed. Reg. 35385 (Oct. 1, 1974). The DOL reasoned, "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Id.*[28]

The notice of final rule making replaced the proposed regulation with its opposite - the current regulation. 40 Fed. Reg. 7404 (Feb. 20, 1975). The DOL noted the change, but provided an explanation inconsistent with the text of the Act: "On further consideration, I have concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. 7404 (Feb. 20, 1975). This explanation is flawed because it does not accurately reflect the terms of the exemption. The exemption does not apply to "any employee engaged in companionship services" as the DOL suggested, but only to "employees *employed in domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added). By leaving out the critical limiting terms, the DOL improperly broadened the scope of the exception to the extension of the Act's coverage beyond the scope of the extension itself.

Congress believed it could avoid adding burdens on individuals and families *(see supra* at 22 n. 26) who employ babysitters and companions without compromising the amendments' goals because, as the Committee Reports explain, Congress did not expect employees in those categories

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[28] When the DOL proposed amending this regulation in 2001, it again explained, "The Department believes that Congress did not intend the 1974 amendments to change the status of workers already covered by the FLSA, but only intended to exclude casual babysitters and companions from those newly covered by the law, that is, those exclusively employed by the homeowner or family member." 66 Fed. Reg. 5485 (Jan. 19, 2001).

to be "regular bread-winners or responsible for their families support." *2 Legislative History* 2144 (H.R. Rep. at 36). *See also 2 Legislative History* 1524 (S. Rep. at 20). Yet workers employed by third parties often are assigned to multiple households and work on a full-time, permanent basis. Unlike the employees employed by families who Congress intended to exempt, employees of third-parties are likely to be "regular bread-winners."

Petitioners assert that the purpose of the companionship exemption was to enable those in need of such services to purchase them at a price they can afford and that such a purpose is served by application of the exemption to employees of third parties. But Petitioners cite nothing in the legislative history suggesting such a purpose,[29] only the District Court's decision and *Welding,* neither of which provide any support for the assertion.

Not only is there no support in the legislative history for the proposition that the exemption was adopted to hold down the cost of services, the exemption is ill suited to this imagined purpose. It is not limited to companionship services provided to indigent elderly or infirm persons. Moreover, it also encompasses babysitting. Surely, most people who employ babysitters, and many elderly and infirm persons in need of companionship services, were and remain fully able to meet the minimal requirements of the FLSA.[30]

Congress did not intend to exempt companions employed by third parties.

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[29] The DOL's Advisory Memorandum cites three, isolated statements during the floor debates, 52a, but close analysis reveals that none of the statements suggests such a purpose even on the part of the individual speakers much less Congress as a whole.

[30] Moreover, today, the elderly and disabled who need but cannot afford companionship services are assisted by all levels of government. *See* 66 Fed. Reg. 5481, 5483 (Jan. 19, 2001).

3. *The Interpretive Regulation is Directly Contrary to A Substantive Regulation*

The interpretive, third-party employer regulation is directly contrary to a substantive regulation also promulgated by the DOL. The Department's definition of "domestic service employment," as that term is "used in section 13(a)(15), . . . "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed."* 29 C.F.R. § 552.3 (emphasis added). Employees providing companionship services are exempt only if they are "employed in domestic service employment." *See* 29 U.S.C. § 213(a)(15) ("any employee employed in domestic service employment to provide companionship services"). Thus, under the DOL's own definition of "domestic service employment," companionship services must be performed for "the person by whom [the provider of such services] is employed" or the exemption is inapplicable. As the Second Circuit correctly found, there is thus a "stark internal inconsistency" between the regulation providing that companions may be employed by third parties and still be exempt and the definition of "domestic service employment," in which companions must be engaged in order to be exempt. 30a.[31] Moreover, the DOL classified the former as an interpretation and the latter as a general regulation having the force of law.

Petitioners argue that the Second Circuit should have deferred to the DOL's construction of § 552.3 in the hastily promulgated Advisory Memorandum, which attempts to reconcile §§ 552.3 and 552.109(a). But the Second Circuit correctly held that deference is inappropriate because § 552 3

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[31] In the proposed revisions of these regulations discussed *infra* at 26-27, the DOL agreed that "the current regulations contain an internal inconsistency" for this reason. 66 Fed. Reg. 5485 (Jan. 19, 2001).

is unambiguous in the relevant respect, citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). 5a. The Memorandum suggests that the phrase "performed by an employee in or about the private home (permanent or temporary) of the person by whom he or she is employed" was intended to mean "performed by an employee in or about a private home." 57a. This reading simply deletes the final ten words of the regulation and is obviously impermissible. Paradoxically, the Memorandum (like the Petitioners) relies on the maxim that courts must read regulations to "harmonize the various parts and provisions of the entire regulation and give them effect, if possible." 56a. However, DOL does not credit this maxim as it applies to the Act itself because the reading of § 552.3 proposed in the Memorandum renders the words "employed in domestic service employment" in the statutory exemption meaningless. In fact, the Memorandum's construction of the two regulations avoids the conflict between them only be rendering the last phrase in § 552.3—"by whom he or she is employed"—entirely superfluous.

Petitioners argue § 552.3 is ambiguous precisely because it is at odds with § 552.109(a). But the conflicting words in the regulations do not render them ambiguous. Thus, the Advisory Memorandum did not construe § 552.3's language to reconcile the regulations, but impermissibly suggested ignoring it. The Second Circuit rightly declined to defer to that suggestion.

4. *DOL has Twice Persuasively Explained Why Companions Employed by Third Parties Are Not Exempt*

As explained *supra* at 22-23, when DOL first proposed the regulations in 1974, it proposed an interpretive regulation denying exemption to companions employed by third parties, persuasively showing why this complied with Congress' intent. In 2001, DOL proposed a revision of the third-party employer regulation to deny exemption to companions employed by

third parties and again persuasively explained why the current regulation conflicts with Congress' intent. 66 Fed. Reg. 5485, 5488 (Jan. 19, 2001). In neither case did DOL adequately justify not adopting the proposed regulation as final.[32]

5. *The Regulation is Inconsistent with the Parallel Babysitter Regulation*

DOL regulations provide that babysitters employed by third parties are not covered by the § 213(a)(15) exemption. 29 C.F.R. § 552.109(b). Yet the Act pairs "babysitting services" and "companionship services" and the two were talked about in the same breath in Congress. In fact, companionship services were defined by reference to babysitting.[33] There is no basis for treating companions employed by third parties differently than babysitters so employed. Thus, the DOL's regulation are internally inconsistent on this point as well.

6. *The Second Circuit's Decision Will Not Create a Gap in Coverage of Domestic Service Employees*

Petitioners argue that accepting DOL's own definition of "domestic service employment" in § 552.3 would limit the

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[32] The faulty explanation for the rejection of the original proposed regulation is discussed *supra* at 23. The 2001 proposal was withdrawn in 2002, *see* 67 Fed. Reg. 16668 (Apr. 8, 2002), but, as the Second Circuit explained, on grounds "that have no bearing on the . . . relevant question of what Congress intended in 1974." 28a.

[33] During Senate floor debate, Senator Williams, Labor Subcommittee Chair, explained "companion" by referring to "babysitters":

> I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters. "Companion," as we mean it, is in the same role—to be there and to watch an older person, in a sense.

1 *Legislative History* 963 (119 Cong. Rec. 24801 (July 19, 1973)). After this explanation, another senator interjected, "In other words, an elder sitter," and Senator Williams replied, "Exactly." *Id.*

sweep of the 1974 extension of the Act's coverage to domestic employees by excluding domestics employed by third-parties too small to qualify for enterprise coverage under 29 U.S.C. § 203(s). This argument has no foundation in the legislative or regulatory history. Nothing suggests Congress considered the status of workers employed by such small employers as grounds for adopting a broad exemption. DOL did not state this rationale when it adopted § 552.109(a) in 1974 or decided not to revise it in 1991.

Moreover, accepting the definition contained in § 552.3 and rejecting § 552.109(a) would have no such effect because the definition of "domestic service employment" contained in § 552.3 defines the term only "[a]s used in section 13(a)(15) of the Act" (indeed, the term only appears in § 13(a)(15) as the language inserted into §§ 6 and 7 by the 1974 amendments to extend coverage to domestic servants is different, *see* 29 U.S.C.§§ 206(f)(1), 207(1)). Thus, accepting the § 552.3 definition for purposes of the application of the exemption avoids the perverse effect that would be caused by applying the limitation on the extension of the Act's coverage to employees of the third-parties who were already covered by the Act prior to its extension, *see supra* at 21-23, and will not limit the sweep of the extension.

For all of these reasons, the Second Circuit correctly held that the regulation is unpersuasive under *Skidmore*.

C. Petitioners Fail to Demonstrate that the Outcome Will Be Different If Chevron Deference Is Accorded

If this Court were to grant review and hold that the regulation is not interpretive, then it would have to remand to the Second Circuit for a determination of whether the regulation is nevertheless invalid because it was not promulgated in compliance with the APA's notice and comment requirements. 5 U.S.C. § 553(b). The Second Circuit would

be bound by its own precedent to hold the regulation invalid for this reason.[34]

As explained *supra* at 22-23, the notice of proposed rule making that led to the third-party employer regulation informed the public that employees of third parties were *not* exempt, *see* 39 Fed. Reg. 35385 (Oct. 1, 1974), but the final regulation provided exactly the opposite. *See* 40 Fed. Reg. 7404 (Feb. 20, 1975). This did not satisfy the APA under Second Circuit precedent.

The Second Circuit has held that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (quoting *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C.Cir. 1985)). This was clearly the case here, where the final regulation was the exact opposite of the proposed regulation. Indeed, this case is almost identical to *Black Media*. There, the FCC promulgated a notice of proposed rule making announcing it would include a minority preference policy in rules governing applications for broadcast licenses, but "then it declined to do so in its final report without providing a meaningful opportunity for comments as required by [the APA]." 791 F.2d at 1018. Here, the DOL announced that the exemption would not apply to employees of third parties, and then the DOL promulgated a final regulation providing that it would. For this reason, the Second Circuit found that the regulation was promulgated after "substandard notice and comment procedure." 25a. A legislative regulation promulgated without complying with the APA is invalid, *see, e.g., Black Media*, 791 F.2d at 1024.

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[34] In addition, even accorded *Chevron* deference, the regulation is inconsistent with the unambiguously expressed intent of Congress as explained *supra* at 20-21 and thus invalid.

Thus, if the regulation is legislative, it would be held invalid by the Second Circuit under the APA.

This Court ordinarily denies review when a reversal would not change the relative rights of the parties in any concrete fashion. Because the regulation will be held invalid even if it accorded *Chevron* deference, this Court should not grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

Although the first question presented in this case is whether the Department of Labor's third party employer regulation is eligible for deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), respondent addresses that issue well past the mid-point of her brief, opening instead with a broad claim that the 1974 Amendments to the Fair Labor Standards Act ("FLSA") clearly and unambiguously deny the "companionship services" exemption to third party employers. Resp. Br. 5-10. However, not only is that contention directly contrary to the view of the Second Circuit below, *see* Pet. App. 5a ("[c]onsideration of congressional intent . . . does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)"), but it turns out to depend almost entirely on a farfetched new statutory argument—that there is a critical (and allegedly unmistakable) difference between the term "employed in domestic service," 29 U.S.C. § 206(f), and the term "employed in domestic service employment," 29 U.S.C. § 213(a)(15)—and on selective quotations from the legislative history that are themselves inconclusive and, for the most part, have nothing to do with "companionship services." Then, upon finally reaching *Chevron*, respondent dismisses the significance of notice and comment in two brief paragraphs and makes a striking argument about the relative unimportance of general rulemaking authority that is both largely irrelevant (because the Department also had, and invoked, a specific "define[] and delimit[]" authority) and erroneous (because this Court has given *Chevron* deference to numerous regulations promulgated under general rulemaking authority). Respondent and her *amici curiae* also put forward extensive policy arguments against the third party employer regulation, many of which simply track arguments that were before the Department several years ago when it decided, after further notice and comment, not to modify the regulation.

Despite this wide array of old and new arguments, we believe that the issues in this case are ultimately quite straightforward. As for *Chevron* eligibility: When Congress has expressly granted rulemaking authority to an administrative agency, and the agency has invoked that authority to conduct a notice-and-comment rulemaking, the resulting regulation should be eligible for *Chevron* deference unless the agency makes clear that it is not issuing a regulation of binding force (a showing that respondent cannot come close to making here). As for *Chevron* application: a regulation subject to the *Chevron* standard should be upheld as long as Congress has not clearly forbidden the agency interpretation, *see Barnhart v. Walton*, 535 U.S. 212, 218 (2002), and the regulation is otherwise within permissible bounds. In this case, notwithstanding respondent's contrary claim, Congress did not unequivocally say that the "companionship services" exemption is inapplicable to workers employed by third parties such as agencies and other family members, leaving it instead to the Department to establish, within reasonable limits, what the scope of the exemption would be. Its determination—that third party employers "are exempt" (29 C.F.R. § 552.109 (a))—is well within those limits, and objections to that decision, on the grounds that it is unwise or counterproductive, should be directed to the Department or to Congress. The regulation thus should be upheld.

I. The Third Party Employer Regulation Is Eligible For *Chevron* Deference

We begin where respondent does not: with whether the third party employer regulation is eligible for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Mead*, the Court said that an agency regulation qualifies for *Chevron* deference if it "appears that Congress delegated authority to the agency generally to make rules carrying the force of law" and that "the agency interpretation claiming deference was promulgated in the exercise of that authority."

Id. at 226-27. Respondent concedes that the first part of the test is met here (although she tries to belittle one of the two grants of authority), but argues that, despite the fact that the Department invoked its rulemaking authority and undertook notice-and-comment rulemaking, it nonetheless foreswore any intention to give the third party employer regulation "the force of law." *See* Resp. Br. 34-47. None of her arguments is persuasive.

In the first place, respondent is far too dismissive of the Department's resort to notice-and-comment rulemaking. This Court has pointed out that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication," *Mead*, 533 U.S. at 230, and the converse of that observation is true as well: it is the rare case in which this Court, or any other, has declined to apply the *Chevron* framework to a regulation promulgated after such procedures. That is for good reason. Not only does the use of notice-and-comment rulemaking tend to show that the agency was doing more than simply offering its opinion on a legal question—something that it is free to do without notice and comment (*see Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995)) —but it also assures that the regulation has received the kind of serious consideration that justifies *Chevron* deference.

Respondent barely mentions the reasons that notice and comment have been given such weight in the *Chevron* context, arguing instead that "[s]urely an agency can decide to adopt an interpretation without exercising its delegated authority to 'make rules with force of law' (in order, for example, to permit greater leeway for judicial construction) but do so after notice and comment." Resp. Br. 44. But, while that proposition is generally true—an agency does not violate the Administrative Procedure Act by engaging in non-mandatory procedures—it should not be taken as a license to turn *Chevron*-eligibility questions into long battles about

whether regulations issued after notice and comment are really just "interpretive rules" with unnecessary process. Thus, where a regulation has been issued after notice and comment, and in express reliance on grants of lawmaking authority extended by Congress, *see* pages 5-7 *infra*, the guiding presumption should be that the agency intended to use the power that Congress gave to it. That presumption can be overcome by clear evidence to the contrary, but the evidence should have to be very clear. *See, e.g., Hall v. EPA*, 273 F.3d 1146, 1155-56 (9th Cir. 2001) (agency statements that rules do not have precedential effect).

Respondent offers nothing of that kind here. Her principal argument for treating the third party employer regulation as an interpretive rule is that it is in a subpart headed "Interpretations." But this placement would be of critical significance only if interpretations were confined to interpretive rules, which they clearly are not. *See* Petr. Br. 27-28 (citing cases). [1] Thus, for example, in *Auer v. Robbins*, 519 U.S. 452 (1997), the Court gave *Chevron* deference to a Department of Labor regulation issued after notice and comment but likewise placed in a subpart headed "Interpretations"—a fact that the Solicitor General called to the Court's attention (Brief of the United States, No. 95-897, at 16 n.4)—finding that it was not "an unreasonable interpretation of the statutory exemption." 519 U.S. at 457.

We think, therefore, that an agency's use of the notice-and-comment process is a strong, if not decisive, indication that

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[1] Indeed, we see no good reason not to give *Chevron* deference even to "interpretive rules"—which may themselves have "the effect of creating new duties" (*Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991))—especially where, as here, the agency has legislative rulemaking authority and has issued the rule after notice and comment. *See* Petr. Br. 28 n.9; U.S. Br. 16-17. Where the agency has subjected the rule to notice and comment, the usual purpose of trying to distinguish between legislative and interpretive rules, *i.e.*, to see whether notice and comment are required, 5 U.S.C. § 553(b)(A), is simply not present.

the agency is promulgating a regulation with the force of law. Of course, to do so, the agency must have the authority to issue binding regulations, but that authority is plainly present here. Congress not only gave the Department the authority to "define[] and delimit[]" the terms of the "companionship services" exemption, 29 U.S.C. § 213(a)(15), but granted it the further authority "to prescribe necessary rules, regulations, and orders with respect to the amendments made by this Act." 88 Stat. 76. The Department then relied on both grants in promulgating the 1975 regulations, including the third party employer regulation, an express reliance that, combined with the fact that the regulation is written in binding terms (*see* Petr. Br. 24-25), supports the understanding that the regulation was meant to have the force of law. [2]

Respondent does not dispute that Congress provided the Department with two distinct grants of lawmaking authority. Rather, she argues at some length that the grant of general authority is a poor cousin of the more specific grant. *See* Resp. Br. 24-29. However, whether or not this is correct at some level—that is, whether certain agency regulations might be entitled to a sort of "super-*Chevron*" deference—it makes little difference here. The Court has repeatedly given extensive deference to regulations promulgated under general grants of rulemaking authority, both before and after *Mead*, including in *Chevron* itself. *See, e.g., National Cable & Tel. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005); *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987); *Chevron* 467 U.S. at 843. Respondent does not even discuss, much less attempt to discredit, those cases.

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[2] Respondent continues to contend, Resp. Br. 45-47, that the third party employer regulation is procedurally defective, an argument that the district court found not to be properly raised. Pet. App. 38-39a n.3. As we have discussed, Reply Br. 9-10 (Petition stage), this argument is wholly without merit, given the fact that the rulemaking gave all interested parties a full opportunity to comment on the central question: whether third party employers are within the scope of the "companionship services" exemption.

Respondent also argues that, unless the general grant of authority is given a lesser status, "the two grants of rule-making authority [would be] redundant." Resp. Br. 27. In addition to being beside the point (because the general grant is sufficient for *Chevron* deference), this is simply not so. The grant of authority in Section 213(a)(15) is in the nature of a congressional directive: it effectively tells the Secretary that he or she is to issue regulations with respect to the "companionship services" exemption. The general grant, on the other hand, leaves it to the Secretary to determine what (if any) rules and regulations are "necessary." Nothing in that grant, however, disables the Secretary from issuing regulations that address subjects covered by other complementary grants of authority.

In any event, the relationship between the two grants of authority is academic here because the Department exercised its "defin[ing] and delimit[ing]" power in promulgating the third party employer regulation. Respondent acknowledges that the Department explicitly referred to both grants as the basis for its regulations (all of them, not just the ones in Subpart A), but she objects that "the notice does not specifically cite the authority given DOL in § 213(a)(15) to 'define[] and delimit[]' the exemption's terms, but merely cites § 213(a)(15) as a whole." Resp. Br. 41. This argument, however, rests on the illogical proposition that, to engage in authorized lawmaking, an agency must actually quote the language of the authorizing provision, rather than just citing to it, and respondent offers nothing (except a law review article that says no such thing) to support that theory. And the Department's statement that "[t]he definitions required by seetion 13(a)(15) are contained in §§ 552.3, 552.4, 552.5, and 552.6," 29 C.F.R. § 552.2(c), means little because the Section 213(a)(15) grant of rulemaking authority is not limited to promulgating "definitions" but explicitly extends to setting the boundaries of ("delimiting") the exemption.

All that is left, then, to demonstrate that the Department did not use its Section 213(a)(15) authority for the third party employer regulation are two sentences in the preamble to the Final Notice repeating a general description of Subparts A and B from the Proposed Notice. *See* 40 Fed. Reg. 7404 (1975) ("Subpart A . . . defined and delimited [terms from Section 213(a)(15)]. Subpart B set out statements of general policy and interpretation concerning the application of the [FLSA] to domestic service employees.") These observations lend some support to respondent's view, but, in the end, we think that they are just too weak a basis for transforming a regulation that has the clear purpose and effect of delimiting the Section 213(a)(15) exemption into a regulation that is deemed to do something else. The plain fact is that Congress expected the Department to "elucidate a specific provision of the statute by regulation," *Chevron*, 467 U.S. at 844, and, the preamble notwithstanding, the Department, in each subpart of its regulations, carried out that responsibility. The third party employer regulation thus rests securely on both grants of rulemaking authority.[3]

In short, the Department's third party employer regulation fully meets the *Mead* standards for *Chevron* eligibility. That said, however, it seems highly doubtful that *Mead* actually requires the kind of microscopic scrutiny that respondent favors as the price of earning *Chevron* deference. The classification rulings at issue in *Mead*, which were among thousands of such rulings issued annually, were not promul-

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[3] We also note that the Department, in its 2005 Advisory Memorandum (Pet. App. 50a-64a), expressly stated that, "at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule." Pet. App. 63a-64a. Respondent is simply incorrect in asserting, Resp. Br. 42 n.42, that "the Memorandum does not characterize the *promulgation* of the regulation as an exercise of DOL's delegated law-making authority. . . ."

gated pursuant to any grant of rulemaking authority and did not undergo the process of notice and comment. Indeed, in concluding that those rulings did not merit *Chevron* deference, the Court repeatedly contrasted such informal agency actions with regulations promulgated after "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement [with the effect of law]." *Mead*, 533 U.S. at 230. There is thus little in *Mead*, or in cases following *Mead*, to indicate that the Court intended to cut back on *Chevron* deference for regulations that are issued under express grants of congressional authority and have been subjected to that "relatively formal administrative procedure."

At bottom, most of respondent's arguments—raising obstacle after obstacle for agencies to clear—are really just a challenge to the idea of *Chevron* deference in the first place. As this Court has observed, "*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps," *Brand X*, 545 U.S. at 982, a premise that carries even greater force where, as here, Congress has expressly instructed the agency to fill out the contours of a statutory provision. Yet, as respondent would have it, an agency that carries out its statutory duties, observing all necessary procedural requirements, will still be subject to judicial displacement because of its choice of subpart headings or introductory statements about the organization of its regulations. That approach would work a fundamental alteration of the principle of judicial deference, and the Court should reject it here.

II. The Third Party Employer Regulation Meets The *Chevron* Standard

The *Chevron* standard, which respondent never actually refers to, provides that a court reviewing an agency regulation must ask "whether the statute unambiguously forbids the [a]gency's interpretation, and, if not, whether the interpretation, for other reasons, exceeds the bounds of the permis-

sible." *Barnhart*, 535 U.S. at 218. On the statutory question here, our position, reflected in Section 552.109(a), is that, by enacting minimum wage and overtime provisions specifically applicable to workers "employed in domestic service," 29 U.S.C. § 206(f) (minimum wage) and "employee[s] in domestic service," 29 U.S.C. § 207(*l*) (overtime), Congress is best understood to have required *all* employers, not just individual homeowners, to pay the indicated wages to workers performing domestic jobs (as maids, housekeepers, etc.) in private homes. By the same reasoning, the Section 213(a)(15) exemption applicable to workers "employed in domestic service employment" who provide "companionship services" would likewise be available to all employers employing such workers to provide services in private homes, not just homeowners employing such employees. For their part, however, respondent and her *amici* ask this Court to divorce the terms of coverage from the terms of the exemption, claiming that, while the coverage provisions concededly apply to employees of both homeowners and third parties, Resp. Br. 6, the exemption applies only to employees of homeowners. Resp. Br. 6. That argument is insupportable on its own terms, and especially so under a proper application of *Chevron*.

A. The Statute. The entire statutory basis of respondent's argument, admittedly never made before, *see* Resp. Br. 10 n.2, is that there is a decisive difference between a) the phrases "employed in domestic service" and "employee[s] in domestic service" (which are used in the minimum wage and overtime coverage provisions) and b) the phrase "employed in domestic service employment" (which is used in the exemption), with the latter phrase, but not the former ones, purportedly applying only to employees employed by individual homeowners. But where does that difference come from? Although respondent contends that an extra word in the exemption provision—"employment"—was specifically included to limit the exemption to "the *relationship of 'employment*,'" Resp. Br. 6 (emphasis in original), that

explanation not only does nothing to establish that the employment must be by the *homeowner* and no one else (the critical point of the argument), but, in any event, makes little sense because the employment relationship is already required by the phrase "employed in," which (inconveniently for respondent's argument) also appears in the minimum wage coverage provision. (Indeed, the concept of "employment" is further captured in both the exemption and minimum wage provisions by use of the word "employee" and in the overtime provision by use of the words "employee" and "employer.") Moreover, the 1974 House Report uses the phrase "domestic service *employment*" in its description of the minimum wage *coverage* provision, not the exemption. *See* H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 11 (1974) ("[d]omestic service employees are described as those who are engaged in domestic service employment more than 8 hours in a workweek"). *See also* 29 C.F.R. § 552.99. All in all, therefore, the speculation that Congress actually intended the word "employment" to impose an otherwise unmentioned limitation on the exemption—in a provision that explicitly specified that *the Department* should define the exemption's terms—does not just fail the *Chevron* "unambiguously forbids" test, but fails any reasonable test of statutory construction.

Respondent is correct, of course, that the "relationship of 'employment'" is important to the Fair Labor Standards Act, but the point is that its importance is not just limited to the exemption for "companionship services." To the contrary, the emphasis on employers and employees throughout the 1974 Amendments establishes that the minimum wage and overtime laws do not generally apply to services provided by independent contractors. Thus, while independent contractors may perform domestic jobs in or about a private home, they are not, by those facts, drawn within the ambit of the Act, because they are not "employee[s] employed in domestic service," 29 U.S.C. § 206(f), or "employee[s] in domestic

service." 29 U.S.C. § 207(*l*). By the same token, given that the "companionship services" exemption is applicable only to domestic workers within the Act, the exemption provision also contains language pointing to the relationship between employer and employee ("any employee employed in domestic service employment"), though without specifying any particular kind of employer. 29 U.S.C. § 213(a)(15).

Respondent fares no better by insisting that, unless the word "employment" is given special significance in the exemption provision, it "would be synonymous with 'service' and therefore superfluous." Resp. Br. 9. While we think that the word "employment" is, in fact, redundant, that is not because it is synonymous with "service" but because it is synonymous with "employee" and "employed." For example, in Section 206(f), the minimum wage coverage provision, the wording could just as easily have read "any person (1) who . . . is employed in domestic service" without altering the meaning of that section. Similarly, the wording in Section 213(a)(15) could instead have been "any employee employed in domestic service" or "any employee in domestic service employment" without expanding or contracting the exemption. Again, the point is simply that there must be an employer and an employee, not that the employer must be the owner of the house.

Finally, respondent seeks to draw indirect support for her "plain meaning" argument from two provisions in statutes relating to Social Security taxes and benefits, *see* 26 U.S.C. § 3510(c)(1); 42 U.S.C. § 1320b-7(a)(3)—enacted 20 and 25 years *after* the 1974 Amendments—one of which defines the term "domestic service employment taxes" to mean "any taxes imposed by chapter 21 or 23 on remuneration paid for domestic service in a private home of the employer . . . ." 26 U.S.C. § 3510(c)(1). (The other provision merely contains a cross-reference to Section 3510.) But the Social Security framework and the Fair Labor Standards Act are different in important respects. Most notably, the Social Security scheme

contains provisions with regard to coverage that apply, by their terms, only to "domestic service in a private home of the employer," *see, e.g.*, 26 U.S.C. §§ 3121(a)(6), (a)(7)(A) & (B); 42 U.S.C. §§ 409(a)(6)(A)&(B), while the Labor Act conspicuously does not. That is because, as respondent acknowledges, Resp. Br. 5-6, the coverage provisions of the FLSA, unlike the Social Security provisions, do *not* generally make any distinction between domestic employees employed by the homeowner and domestic employees employed by third parties. Thus, while respondent is certainly correct that Congress was aware of various provisions of the Social Security framework, it is noteworthy that Congress did not put the limiting "private home of the employer" language into the FLSA. Respondent's attempt to do so retroactively—into one selected subsection and based on unrelated tax provisions enacted decades later—is too little, too late.[4]

B. Legislative History. Respondent and her *amici* devote much of their briefs to recitations from the legislative history of the 1974 Amendments, although very little of that history even mentions the "companionship services" exemption. Insofar as they intend to demonstrate that Congress wanted to improve conditions for workers "employed in domestic service," that is common ground: the parties and *amici* agree that the coverage provisions of the Amendments broadly apply to all workers "employed in domestic service," regardless of whether they are employed directly by the homeowner or by a third party. *See, e.g.*, Resp. Br. 6. But the fact that

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[4] The only direct reference to Social Security provisions in the domestic service part of the FLSA actually appears in one of the *coverage* provisions, 29 U.S.C. § 206(f)(1), which specifies, as one of two independent bases of coverage, that the employee be paid the minimum total amount of "wages" necessary for homeowner coverage under the Social Security framework (50 dollars per quarter in 1974). The alternate basis for coverage—that the employee work an aggregate total of eight hours in a workweek (counting all employers)—applies regardless of any Social Security provisions. 29 U.S.C. § 206(f)(2).

Congress had a sweeping general purpose does not, in itself, resolve the question here because Congress also enacted an express exemption for those domestic workers that provide "companionship services." Its decision to incorporate that exemption into the Act necessarily indicates that Congress found it important not to impose federal minimum wage and overtime obligations with respect to that particular job.

The numerous references to "housewives" in the legislative history also provide little help in analyzing the "companionship services" exemption. Those references are concerned with the coverage provisions of the Amendments, not the exemption, and, as we have noted several times, respondent does not argue that the coverage provisions are limited to workers employed by "housewives" (or by private homeowners generally). Thus, there is nothing in those statements on which to base an argument that, for reasons of consistency, the exemption also should be limited to workers employed by "housewives" (or by private homeowners generally). (Indeed, the argument for consistency would require that the exemption apply to *all* employers. *See* pages 8-11 *supra*.) Furthermore, the fact that "housewives" received much of the attention during the debates is hardly surprising, given that opponents of domestic service coverage chose that focus in order to emphasize the recordkeeping burdens that the Amendments would place on individual homeowners. *See, e.g.*, 119 Cong. Rec. 24,797 (statement of Sen. Dominick).

Respondent and her *amici* do cite some statements in the legislative history that actually involve the "companionship services" exemption, but those statements do not bear the weight that respondent and her *amici* seek to place on them. For example, although they argue that the "companionship services" exemption should apply only to workers employed by the homeowner because it, like the exemption for babysitting services, supposedly was aimed at workers that are not "breadwinners," *see* Resp. Br. 20-21, the argument makes neither textual nor practical sense. As a textual matter, it is

readily apparent that the language with respect to the babysitting and "companionship services" exemptions is very different: the babysitting exemption applies only to employees "employed on a casual basis," 29 U.S.C. § 213(a)(15), whereas the "companionship services" exemption carries no such restriction. Furthermore, the notion that "companions" employed by homeowners are in a unique category of nonbreadwinning domestic employees is doubtful for at least two reasons: *first*, the 1973 Wage Report stated that only three in ten domestic workers of any kind were heads of households in the early 1970s, *see* Department of Labor 1973 Wage Report to Congress at 28-29, indicating that Congress was not basing coverage on whether employees were supporting their families or not; and *second*, there is, in any case, no necessary correlation between the type of employer and whether the employee is a breadwinner. One federal court of appeals has flatly rejected just this kind of breadwinner/nonbreadwinner distinction. *See McCune v. Oregon Senior Services Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990).

Respondent and her *amici* also rely on a few statements describing companions as "elder sitters," *see, e.g.*, Alliance for Retired Americans Br. 5, using them to suggest that Congress did not intend the exemption to apply to workers (like home health aides) that provide more extensive care. But this contention is really just a roundabout way of attacking an entirely different Department of Labor regulation—the one defining "companionship services" (29 C.F.R. § 552.6)—and has little to do with the separate question of whether third party employers are entitled to the exemption. Furthermore, as several federal courts of appeals (including the Second Circuit below, *see* Pet App. 15a-22a) have concluded, the argument is unpersuasive on its merits. *See, e.g., McCune*, 894 F.2d at 1110; *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304, 1309-10 (7th Cir. 1995). Despite the isolated remarks about elder sitting, the exemption that Congress actually enacted is applicable to workers providing "companionship

services" to those persons—and only those persons—"who (because of age or infirmity) are unable to care for themselves . . . ." 29 U.S.C. § 213(a)(15). In light of that statutory language, it is most natural to define "companionship services," as the Department has done, to include both fellowship and the giving of care that clients are unable to provide for themselves.

Finally, respondent and her *amici* argue that Congress must have limited the exemption to workers employed by private homeowners because, otherwise, the exemption would deny minimum wage and overtime protection to workers who had previously been covered by the "enterprise" provisions of Sections 206(a) and 207(a). *See* Resp. Br. 11-13. But, in the first place, this argument proves too much. If the exemption were limited to homeowner employed workers, as respondent proposes, it would make the exemption inapplicable not just to workers employed by covered enterprises, but also to workers employed by other third parties such as small agencies and family members living in a different household, none of whom had been covered by the Act before. Respondent offers no reason to think that Congress wanted to deny the exemption to such previously uncovered employers.

It is also unlikely that Congress would have permanently narrowed the "companionship services" exemption because of possible concerns about what would then have been a very small number of workers. Although some domestic workers had been covered under the "enterprise" provisions before 1974, Congress was aware that "[t]he vast majority of the private household workers were employed directly by a member of the household." Department of Labor 1974 Wage Report to Congress at 32; 1973 Wage Report at 28. Assuming that this was true for persons providing "companionship services" as well—a fair assumption in 1974—then only a relatively few actual workers would have lost any existing protection as a result of the enactment of Section 213(a)(15). Indeed, although the Department had originally proposed a

regulation that would have put employees of a covered enterprise outside of the exemption, *see* 39 Fed. Reg. 35,385 (1974), it ultimately made a conscious decision, following notice and comment, to include them within the exemption. *See* 40 Fed. Reg. 7405.

In our view, the Department's conclusion is the most reasonable one, and certainly nothing in the statute or legislative history "forbids" it. As we have discussed, *see* Petr. Br. 39, Congress had never directly addressed the subject of applying the wage and hour laws to "companionship services" prior to 1974, and its decision to enact a broadly worded exemption for such services—without making any exception for workers employed by covered enterprises (or even grandfathering anyone who had formerly been covered)—indicates that it wanted persons unable to care for themselves to be able to obtain "companionship services" without the additional costs imposed by the federal wage and hour laws. *See* Petr. Br. 38-39. Furthermore, as a general matter, there is nothing at all unusual about Congress deciding to exempt workers employed by a covered enterprise: because the enterprise provisions supply the basis for covering most workers, including public employees, the exemptions set forth in Section 213 necessarily apply almost exclusively to workers employed by covered enterprises. Indeed, the most recently added wage and hour exemption not only exempts workers employed by covered enterprises, but exempts workers who had previously been covered by the Act. *See* 29 U.S.C. § 213(a)(17).

C. The Department's Regulations. Respondent also seeks to rest her divergent views of coverage and exemption on the Department's regulation defining the term "domestic service employment." *See* 29 C.F.R. § 552.3. However, the Department made clear in its 2005 Advisory Memorandum that Section 552.109(a) is the only regulation that addresses third party employment, and that Section 552.3 simply does not do so. Although respondent accepts that courts typically

must defer to an agency's reading of its own regulations, Resp. Br. 32, she says that this principle is confined to cases of ambiguity and that there is no ambiguity here because "two unambiguous regulations can conflict and that does not render either of them ambiguous." Resp. Br. 32 n.28. What this assertion overlooks, however, is the obligation to see whether seemingly conflicting regulations can be read harmoniously, *see Jay v. Boyd*, 351 U.S. 345, 360 (1956), or, to put it another way, the obligation to see if one or the other of the "unambiguous" regulations, read in context, might mean something different. Here, as the Department has said, that more searching analysis properly leads to an understanding that Section 552.3, while not ideally worded, *see* U.S. Br. 25, was really dealing with what type of work was covered by the 1974 Amendments and where it was to be performed, not with whether the employer actually had to be the homeowner receiving services. *See* Pet. App. 57a. The latter question was instead addressed directly in Section 552.109(a).

It also is doubtful that the definition in Section 552.3—if it actually meant what respondent says that it means—could be regarded as applying to the exemption alone. (Respondent concedes that the coverage provisions are *not* limited to workers employed by homeowners. *See* pages 9-13 *supra*.) Although the regulation begins "[a]s used in section 213(a)(15)," which suggests such a limitation, the bulk of the regulation then goes on to set out a non-exclusive list of the kinds of jobs that "the term includes," ranging from cooks and waiters to footmen and grooms. Those jobs have nothing to do with the exemption in Section 213(a)(15), which is limited to casual babysitters and workers providing "companionship services." Furthermore, no other regulation addresses the subjects that Section 552.3 addresses, despite the fact that they are integral to the Act as a whole. All this supports the notion that Section 552.3 is not an exemption-only definition of who must employ domestic workers, but rather a broadly

applicable definition of who domestic workers are. *See* U.S. Br. 28 & n.9.

Respondent also fails to address another weakness in her Section 552.3 theory: the double-edged language of 29 C.F.R. § 552.101(a). While Section 552.101(a) does parallel Section 552.3 in one respect—it says that "[t]he domestic work must be performed in or about the private home of the employer . . . " —it contains a second declaration that flatly contradicts that assertion: "[T]he term [domestic service employment] includes persons who are frequently referred to as 'private household workers.'" Despite an extended discussion of the term by one *amicus*, *see* Law Professors Br. 6-9, it is perfectly clear that, by "private household workers," the Department meant not just workers employed by homeowners, but also workers employed by "a household service business whose services had been requested by a member of the household occupying that residence." *See* 1973 Wage Report at 27; 1974 Wage Report at 32-33. Like members of Congress, therefore, *see* Petr. Br. 35-36, the Department used the terms "domestic service employees" and "private household workers" to mean the same thing, which seriously undermines any contention that the Department, in either Section 552.3 or Section 552.101(a), clearly intended to limit the scope of the exemption (or the Act itself) to employees employed by the homeowner.

Despite hazy emanations from other regulations, the Department has made one thing absolutely clear: that third party employers of workers providing "companionship services" are exempt from the minimum wage and overtime provisions. *See* 29 C.F.R. § 552.109(a). That regulation has been questioned at times,[5] but it has remained in force for more than

[5] The Department has several times proposed at least partial elimination of Section 552.109(a), *see* Petr. Br. 5, and, at various points (mostly during the period of efforts to eliminate it), the Department has either overlooked it or confined it to the "joint employer" context. *See* Resp. Br.

three decades. And, when all is said and done, nothing in the Act, the legislative history, or the Department's own regulations unmistakably bars that interpretation, or even points towards a better one. The regulation is valid.

III. The Policy Arguments Made By Respondent And Her *Amici* Do Not Justify Invalidation of the Regulation

Respondent and her *amici* make a wide-ranging series of policy arguments against the third party employer regulation, saying, among other things, that changes in the home care field have led to an increasing number of exempt workers and that invalidation of the regulation would help to attract more needed home care workers. Many, if not most, of these arguments were before the Department just six years ago when it last considered whether to modify the regulation; in fact, the Department set forth a number of them in its own notice of proposed rulemaking. *See* 66 Fed. Reg. 5482-83 (2001). Ultimately, however, the Department concluded that concerns about cost—some of them expressed by other federal agencies—tilted the balance against the proposed change. *See* 67 Fed. Reg. 16,668 (2002). Respondent is now effectively asking the Court to reweigh the possible pros and cons, substituting its own judgment for that of the agency, an invitation that is directly contrary to the principles of *Chevron*.

A few brief observations about the policy arguments are nevertheless appropriate. As an initial matter, it is a common element of the attacks on the regulation that they posit the availability of more money, an assumption that diminishes the need to confront potential tradeoffs between increased costs and reduced care (or possible institutionalization). But, as our supporting *amici* have pointed out in detail, this

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33 (citing opinion letters). These letters, however, were "rescinded and withdrawn" by the Department in 2002. *See* Admin. Op. Ltr. FLSA 2002-7, 2002 WL 32406597 (DOL August, 16, 2002).

assumption is at best highly debatable, at worst almost certainly wrong. The agencies providing home care workers to the elderly and disabled are often "small community-based not-for-profit organizations that operate virtually at cost," Continuing Care Leadership Coalition Br. 12, and, in New York, more than half of the home health care agencies are already losing money. *Id.* at 11. And the expectation that third party payors like Medicare and Medicaid will simply step into the breach seems very unlikely in view of the strong pressure to freeze, or cut, the outlays by those programs. *See id.* at 22-23.

Invalidation of the regulation would also create odd distinctions and incentives. For example, as the National Association for Home Care & Hospice brief points out, Medicare provides reimbursement for home health services only if they are provided by agencies that meet strict standards. *Id.* at 5-6. As a result, under respondent's view of the statute, no employee providing Medicare-covered services would ever fall within the Section 213(a)(15) exemption. Moreover, while Medicaid requirements vary depending on the State or service, "home health services" likewise must be provided by a qualified "home health agency." *See id.* at 6. And, even where reimbursement is not at issue, the limitations proposed by respondent and her *amici* would create a financial disincentive for homeowners to rely on workers from third party agencies, despite the considerable benefits (hiring, screening, recordkeeping, and the like) that agencies can provide to the particular individuals that Congress intended to help: those "who (because of age or infirmity) are unable to care for themselves." 29 U.S.C. § 213(a)(15). If those matters are now to be reexamined after 30 years, the Department and Congress are the proper forums, not the federal courts.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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LONG ISLAND CARE AT HOME, LTD., ET AL.,
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v.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a longstanding Fair Labor Standards Act regulation, 29 C.F.R. 552.109(a), promulgated by the Department of Labor pursuant to delegated rulemaking authority and after notice and comment, was not entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and was not enforceable.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The question presented in this case is whether a long-standing Department of Labor (DOL) regulation, 29 C.F.R. 552.109(a), which was promulgated pursuant to statutory rulemaking authority after notice and comment, is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and is enforceable. At the Court's invitation, the United States filed a brief at the petition stage when this case first came before the Court. 126 S. Ct. 1189 (2006) (granting writ of certiorari, vacating, and remanding for further consideration in light of DOL's Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005), Pet. App. 50a-64a).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay a minimum wage and, for hours of work exceeding 40 in a work week, overtime compensation at a rate of one and one-

half times an employee's regular rate of pay. 29 U.S.C. 206(a), 207(a)(1). Before 1974, covered employees included those "engaged in commerce or in the production of goods for commerce" (individual coverage), and, since 1961, those "employed in an enterprise engaged in commerce or in the production of goods for commerce" (enterprise coverage). 29 U.S.C. 206(a) and 207(a)(1) (1970). The Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, extended the FLSA's minimum wage and overtime requirements to "domestic service" employees, 29 U.S.C. 206(f), 207(*l*), but specifically exempted such employees providing "companionship services" to the elderly or infirm. That exemption applies to:

> any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

29 U.S.C. 213(a)(15). In addition to this specific grant of authority to "define[] and delimit[]" such terms as "domestic service employment" and "companionship services," which Congress did not otherwise define, Congress also authorized the Secretary of Labor "to prescribe necessary rules, regulations, and orders" with regard to the 1974 Amendments. § 29(b), 88 Stat. 76.

Pursuant to both grants of authority, DOL promulgated regulations describing the application of the FLSA to domestic service employees. 29 C.F.R. Pt. 552. Adopted in February 1975, those regulations are divided into two subparts, "General Regulations" and "Interpretations." Their purpose is to "provide[] necessary rules for the application of the [FLSA] to domestic service employment" in accordance with the 1974 Amendments. 29 C.F.R. 552.2(a).

"[C]ompanionship services" are defined, in the "General Regulations" subpart, as "those services which provide fellow-

ship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." 29 C.F.R. 552.6. A regulation in the "Interpretations" subpart, 29 C.F.R. 552.109(a), exempts domestic service employees providing companionship services from the FLSA's minimum wage and overtime pay requirements when they are employed by a third party:

> Employees who are engaged in providing companionship services, as defined in [29 C.F.R.] § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15) [of the FLSA].

29 C.F.R. 552.109(a).

A separate regulation in the "General Regulations" subpart states that "domestic service employment," as used in Section 13(a)(15) of the Act, "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3. A regulation in the "Interpretations" subpart explains that the meaning of "domestic service employment" derives from Social Security regulations and the "generally accepted" meaning of the term, and includes persons frequently referred to as "private household workers." 29 C.F.R. 552.101(a) (citations omitted).

All the regulations at issue, including Section 552.109(a), were issued pursuant to notice-and-comment rulemaking in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. Initially, DOL proposed that employees who provide companionship services, but "are employed by an employer other than the families or households using such services," would not be covered by the companionship exemption if the third-party employer would qualify as a covered enterprise under Sections 3(r) and 3(s)(1) of the FLSA, on the ground that such third-party employment was covered by the

FLSA before the 1974 Amendments. See 39 Fed. Reg. 35,385 (1974) (proposed § 552.109). Thus, under the original proposal, domestic service employees providing companionship services and working for a third-party employer would fall within the exemption only if their employer did not satisfy the Act's "enterprise" test for coverage.[1]

After receiving and considering comments on the proposed rule, however, DOL decided that *all* third-party employment, without regard to the employer's status as a covered enterprise, should be included within the scope of the companionship services exemption. See 40 Fed. Reg. 7405 (1975). DOL acknowledged that its decision constituted a change from the proposed rule, but explained that under the text of Section 13(a)(15) of the Act, the "exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Ibid.* "This interpretation," DOL continued, "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Ibid.* Thus, the final regulation promulgated to implement the 1974 Amendments expressly applies the companionship services exemption to employees who provide companionship services and "are employed by an employer or agency other than the family or household using their services." 29 C.F.R. 552.109(a).

In 1993, DOL proposed regulatory amendments to limit the companionship services exemption to employees of a third-party employer or agency only when the employee is jointly employed by the person receiving the services. See 58 Fed. Reg. 69,312. Most commenters opposed the proposed change. See 60 Fed. Reg. 46,797-46,798 (1995). In 1995, DOL reopened the comment period for the 1993 proposal to consider whether to revise it to allow the companionship services

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[1] At the time, to qualify as an "enterprise," an employer, *inter alia*, had to have annual gross sales of at least $250,000. See 29 U.S.C. 203(s)(1) (1970). That limit has since been changed to $500,000. See 29 U.S.C. 203(s)(1)(A)(ii).

exemption to also apply to employment, either jointly with a third-party agency or otherwise, by a government agency or family member acting on behalf of an incapacitated elderly or infirm person. *Id.* at 46,798. Commenters expressed concern with the changes, and DOL did not adopt either the 1993 or the 1995 proposal. See 66 Fed. Reg. at 5485.

In January 2001, DOL again proposed to amend the regulations to, among other things, eliminate the exemption in Section 552.109(a) for employers other than the family or household for whom the services are provided. 66 Fed. Reg. 5485, 5488. In the notice of proposed rulemaking, DOL recognized that "[u]nder the existing regulation, employees who are employed by an employer or agency other than the family or household using the companionship services may still qualify for the exemption." *Id.* at 5485. DOL, at that time, expressed the view that the regulations contain an internal inconsistency because 29 C.F.R. 552.3, in defining "domestic service employment," refers to an employee's employment in or about the private home "of the person by whom he or she is employed," and also opined that the proposed new rule would not have a significant economic impact. 66 Fed. Reg. 5485-5486. In 2002, however, DOL withdrew the proposed rule because numerous commenters, including the Small Business Administration (SBA) and the Department of Health and Human Services (HHS), challenged DOL's conclusion that the rule would have little economic impact. See 67 Fed. Reg. 16,668. Thus, although DOL has periodically sought public comment on whether to amend the third-party employer regulation at 29 C.F.R. 552.109(a), the regulation has remained unchanged since its adoption in 1975.

2. Petitioners employ approximately 40 home health care aides, who provide companionship services to approximately 30 homebound patients in New York. Pet. App. 34a, 84a. Respondent is a former employee of petitioners who worked as a home health care attendant. *Id.* at 34a. Respondent brought suit against petitioners under the FLSA, alleging

that despite working more than 40 hours a week, she never received overtime payments, and that her hourly wage was less than the minimum wage. *Ibid.*

The district court granted petitioners' motion for judgment on the pleadings, holding that respondent could not state a claim as a matter of law because home health care workers are exempt from the minimum wage and overtime requirements in 29 U.S.C. 206 and 207 under the companionship services exemption in 29 U.S.C. 213(a)(15) and its implementing regulations. Pet. App. 47a-48a. The court applied the standard set forth in *Chevron* for reviewing legislative rules and held that 29 C.F.R. 552.109(a) is not arbitrary, capricious, or manifestly contrary to the FLSA in including employees of third-party employers within the scope of the companionship services exemption. Pet. App. 39a-47a.

3. In 2004, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 7a-32a. The court held that 29 C.F.R. 552.109(a) is not entitled to *Chevron* deference. Pet. App. 23a-28a. The court acknowledged that the FLSA's companionship services exemption expressly grants authority to DOL to define and delimit the terms of the statutory provision; that the regulation is both contemporaneous and longstanding; and that Congress had amended 29 U.S.C. 213 seven times since 1974 without expressing disapproval of the agency's interpretation. *Id.* at 24a. The court also recognized that Section 552.109(a) was the product of notice-and-comment rulemaking; that all other courts that have considered the issue have applied *Chevron* deference and upheld the regulation; and that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests' as legislative regulations do." *Id.* at 24a-25a, 26a (citation omitted). The court concluded, however, that DOL did not intend to use its legislative rulemaking authority when promulgating 29 C.F.R. 552.109(a) because the regulation is included in Subpart B of Part 552, entitled "Interpretations," and because another regulation (29 C.F.R. 552.2(c)) states that the "defini-

tions required by [29 U.S.C. 213(a)(15)] are contained in §§ 552.3, 552.4, 552.5 and 552.6." Pet. App. 26a. Relying on *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), the court reasoned that the regulation is therefore "interpretive," rather than "legislative," and that it is not entitled to *Chevron* deference. Pet. App. 26a-27a.

The court then held that the third-party employer regulation is unenforceable under the less deferential standard set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 29a. In the court's view, the regulation is inconsistent both with Congress's likely intent in enacting the 1974 Amendments and with 29 C.F.R. 552.3's definition of domestic service employment, and was the product of inadequate reasoning. Pet. App. 29a-32a.

4. Petitioners filed a petition for a writ of certiorari, and the Court invited the Solicitor General to express the views of the United States. Thereafter, DOL issued an authoritative Advisory Memorandum making clear its view that the promulgation of 29 C.F.R. 552.109(a) was an exercise of DOL's expressly conferred legislative rulemaking authority. See Pet. App. 50a-64a. Specifically, the Advisory Memorandum states that DOL considers Section 552.109 to be a legally binding legislative rule. Pet. App. 63a-64a. The Advisory Memorandum also explains that Section 552.109(a) represents the best reading of the companionship services exemption in 29 U.S.C. 213(a)(15), Pet. App. 50a-52a; is consistent with other regulatory provisions, *id.* at 54a-62a; and best reflects Congress's concern "that working people could not afford to pay for companionship services if they had to pay FLSA wages," *id.* at 52a. Consistent with the recommendation of the United States, the Court granted the petition for a writ of certiorari, vacated the court of appeals' decision, and remanded the case so that the Second Circuit could consider the Advisory Memorandum. 126 S. Ct. 1189 (2006).

5. On remand, the court of appeals again denied *Chevron* deference to 29 C.F.R. 552.109(a). Pet. App. 2a-6a. The court

acknowledged that Congress granted legislative rulemaking authority to DOL. *Id.* at 3a. However, the court adhered to its original conclusion that DOL did not intend the third-party employer regulation to be a legislative rule. *Ibid.* The court discounted DOL's explanation in the Advisory Memorandum that it had always considered Section 552.109(a) to be a legally binding legislative rule, reasoning that the regulation could have been intended merely as internal guidance not meant to have the force of law outside the agency. *Id.* at 3a-4a.

The court again invoked *Skidmore*, and concluded that nothing in DOL's Advisory Memorandum convinced it that its original decision was in error. Pet. App. 4a. The court acknowledged, contrary to its earlier decision, see *id.* at 29a-30a, that consideration of congressional intent did not resolve whether 29 C.F.R. 552.109(a) is a permissible interpretation of the statute. Pet. App. 4a-5a. However, the court rejected the reasoning of the Advisory Memorandum and deemed that regulation inconsistent with the other regulations in 29 C.F.R. Pt. 552, including Section 552.3. In addition, the court stated that the Advisory Memorandum did little to allay its concern regarding the consistency of DOL's position over time and the thoroughness of its original consideration and reasoning when it promulgated Section 552.109(a). Pet. App. 5a-6a.

SUMMARY OF ARGUMENT

I. DOL's third-party employer regulation at 29 C.F.R. 552.109(a) should be analyzed under *Chevron*'s deferential framework because it was promulgated pursuant to an express statutory grant of rulemaking authority and after notice and comment. See *Mead*, 533 U.S. at 226-227, 229-230; *Chevron*, 467 U.S. at 843-844. DOL's placement of the regulation in a subpart of its regulations entitled "Interpretations" does not change the analysis. Both subparts of the regulation were subject to notice and comment and both were intended to have the force of law, as authoritatively explained in DOL's Advi-

sory Memorandum, Pet. App. 51a, 63a-64a. See *Auer* v. *Robbins*, 519 U.S. 452, 457-458 (1997).

II. Under *Chevron*, such a legislative rule should be sustained unless it is "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. The FLSA's companionship services exemption does not address third-party employment. See 29 U.S.C. 213(a)(15). DOL's regulation at 29 C.F.R. 552.109(a), however, specifically provides that the exemption applies to employees of third parties. That regulation is a reasonable interpretation of the statutory companionship services exemption which, by its terms, applies to "any employee employed in domestic service employment to provide companionship services * * * (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. 213(a)(15). The regulation also furthers Congress's intent to ensure that working people would be able to afford companion services, a rationale that applies equally to all companions, irrespective of the identity of their employer. Advisory Mem., Pet. App. 52a.

As DOL explained in its Advisory Memorandum, Section 552.109(a) was promulgated after notice and comment as an exercise of legislative rulemaking authority and is the only regulation that directly addresses the third-party employment question. Pet. App. 63a. There is no conflict between DOL's third-party employer regulation and the other regulations in Part 552, including 29 C.F.R. 552.3, which addresses the kind of work that qualifies as domestic service and where it must be performed. *Ibid.* While 29 C.F.R. 552.3 could have been more artfully drafted to accommodate the third-party employment situation, Section 552.109(a) addressed that situation directly, and there is no basis for manufacturing a conflict. In all events, DOL's interpretation of its own regulations is entitled to deference. *Auer*, 519 U.S. at 461.

DOL carefully considered competing policy interests implicated by the third-party employer regulation both when it first promulgated the regulation in 1975, and in the over 30

ensuing years. In all that time, DOL has repeatedly come to the same conclusion, that the third-party employer regulation reasonably serves the interests Congress wanted to promote in enacting the companionship services exemption. That careful consideration and consistency over a long period of time provides a further reason to uphold the regulation.

ARGUMENT

I. DOL'S THIRD-PARTY EMPLOYER REGULATION IS ENTITLED TO *CHEVRON* DEFERENCE

Under *Chevron*, an agency's reasonable interpretation of a silent or ambiguous statute that Congress has charged it with administering is entitled to deference. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." 467 U.S. at 843-844. Such "legislative regulations" must be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843. If the legislative delegation to the agency on a particular question is "implicit" rather than "explicit," the agency's interpretation must be upheld if it is "reasonable." *Id.* at 844. Under either standard, a reviewing court cannot reject the agency's interpretation "simply because the agency's chosen resolution seems unwise." *Mead*, 533 U.S. at 229.

Thus, deference is required under *Chevron* at least where: (1) Congress expressly granted authority to the agency to make rules carrying the force of law; and (2) the agency promulgated such rules pursuant to that authority. See *Mead*, 533 U.S. at 226-227, 233 (denying *Chevron* deference to a tariff classification ruling because the Customs Service did not have a "lawmaking pretense in mind" when it issued the ruling). *Mead* highlights the importance of notice-and-comment rulemaking as an indication that an agency interpretation has the "force of law" and should be analyzed under *Chevron*'s framework. *Id.* at 230 ("[T]he overwhelming number of our

cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). And since *Mead*, the Court has expressly held that *Chevron* applies where an agency with express legislative rulemaking authority issues rules after notice and comment. See *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 45 (2002) (applying *Chevron*'s framework to regulations implementing the "Single State Registration System" of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 4005, 105 Stat. 2146, 49 U.S.C. 11506(c) (1994)); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-981 (2005) (applying *Chevron* to a Federal Communications Commission (FCC) ruling classifying broadband cable Internet service providers under the Communications Act).

A. Congress Clearly Granted Rulemaking Authority To DOL Concerning Application Of The Companionship Services Exemption

The third-party employer regulation at 29 C.F.R. 552.109(a) easily satisfies the first of the two criteria that *Mead* identified as sufficient for *Chevron* deference. As the court of appeals acknowledged on remand, "[t]here is no dispute that Congress delegated to the Department of Labor * * * the authority to promulgate legislative rules, which carry the force of law." Pet. App. 2a-3a. That delegation was twofold. First, Congress granted the Secretary the authority to "define[] and delimit[] by regulations" the terms of the companionship services exemption. 29 U.S.C. 213(a)(15). Such a provision gives the Secretary broad authority to promulgate binding legal rules governing the construction of those terms and the application of the exemption. See *Auer*, 519 U.S. at 456-458 (FLSA provision granting the Secretary authority to "define[] and delimit[]" the Act's exemption for employees employed in an executive, administrative, or professional capacity, 29 U.S.C. 213(a)(1), gives the Secretary broad authority to issue legally binding rules). Second, Con-

gress also gave the Secretary general authority "to prescribe necessary rules, regulations, and orders" with regard to the 1974 Amendments, including the provisions governing domestic service employment. 1974 Amendments § 29(b), 88 Stat. 76. Such a statutory provision also gives the Secretary authority to promulgate binding legal rules. See *National Cable*, 545 U.S. at 980-981 (statutory authorization for FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act gave FCC broad authority to promulgate binding legal rules).

B. DOL Exercised Its Statutory Rulemaking Authority In Promulgating Section 552.109(a)

1. Section 552.109(a) also satisfies the second of the two criteria that are sufficient to trigger *Chevron* deference, because DOL promulgated the rule pursuant to its authority to issue rules with the force of law. DOL's use of notice-and-comment rulemaking to issue Section 552.109(a), see 39 Fed. Reg. at 35,382 (proposed rule); 40 Fed. Reg. at 7404 (final rule), is strong evidence that DOL promulgated that regulation pursuant to its authority to make legally binding rules. See *Mead*, 533 U.S. at 229-230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

Moreover, DOL has repeatedly stated that it was using its legislative rulemaking authority. DOL promulgated Section 552.109(a) at the same time it promulgated the other Part 552 regulations addressing the application of the FLSA to domestic service, and expressly invoked 29 U.S.C. 213(a)(15) and Section 29(b) of the 1974 Amendments as the authority for *all* those regulations. See 29 C.F.R. Pt. 552; 40 Fed. Reg. at 7405; 39 Fed. Reg. at 35,382. DOL further explained that the purpose of the regulations—both the "General Regulations"

and "Interpretations" subparts—is to "provide[] necessary rules for the application of the Act to domestic service employment" in accord with the 1974 Amendments. 29 C.F.R. 552.2(a). DOL thereby invoked its legislative rulemaking authority for all the Part 552 regulations, including the third-party employer regulation.

DOL confirmed that Section 552.109(a) is a legislative rule when it considered whether to revise that section in 1993, 1995, and 2001, by relying on notice-and-comment procedures, which would have been unnecessary if the provision was merely intended to provide internal agency guidance, as the court of appeals suggested. And in its December 2005 Advisory Memorandum, DOL authoritatively confirmed that it has always treated the regulation as a binding legislative rule. Pet. App. 64a. As DOL explained in 1975 and again in 2005, Section 552.109(a) makes the statutory exemption "available" to third-party employers, expressing DOL's intention, at the time the final rule was promulgated, that the availability of the companionship services exemption to third-party employers turned decisively on DOL's regulation, something that could be true only of a legislative rule. Pet. App. 63a-64a (citing 40 Fed. Reg. at 7404-7405).

2. The court of appeals nonetheless concluded that Section 552.109(a) "was self-consciously not promulgated in exercise of Congress's delegated authority," Pet. App. 26a, because DOL placed Section 552.109(a) in Part 552's "Interpretations" subpart and stated in a preamble that the Interpretations subpart sets forth "a statement of general policy and interpretation concerning the application of the [FLSA] to domestic service employees," while regulations "defining and delimiting" terms, including "[t]he definitions required by section 13(a)(15)," were in the "General" regulations subpart. Pet. App. 3a (brackets in original) (citing 39 Fed. Reg. at 35,382 and 29 C.F.R. 552.2(c)). The placement of 29 C.F.R. 552.109(a) in the "Interpretations" subpart is an insufficient basis for ignoring DOL's use of notice-and-comment proce-

dures and its express reliance on its legislative rulemaking authority.

The court of appeals placed too much weight on Subpart B's "Interpretations" heading and the preamble statement that Subpart B set out a "statement of general policy and interpretation." Such characterizations are not dispositive. See *CBS* v. *United States*, 316 U.S. 407, 416 (1942) ("The particular label placed upon [an order promulgating regulations] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."). Significantly, this Court, in *Auer*, applied *Chevron*'s framework to a DOL FLSA regulation issued pursuant to notice-and-comment rulemaking, even though it was set out in an "Interpretations" subpart rather than a "General Regulations" subpart. See 519 U.S. at 457-458 (giving *Chevron* deference to 29 C.F.R. 541.118(a) (2003)).[2] *Auer* confirms that when DOL promulgates a regulation through notice-and-comment procedures pursuant to rulemaking authority conferred by the FLSA, as DOL did here, the regulation is entitled to *Chevron* deference despite its placement in an "Interpretations" subpart.

A far more relevant consideration in determining whether a rule is legislative is whether it is "one affecting individual rights and obligations." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). Section 552.109(a) unquestionably is intended to and does affect individual rights and obligations. Indeed, the court of appeals acknowledged that Section 552.109(a) "grants rights, imposes obligations, or produces other signifi-

[2] Section 541.118(a), which was promulgated pursuant to notice-and-comment rulemaking, see 19 Fed. Reg. 1321-1322 (1954), established a salary-basis test for determining when an employee is employed in an executive, administrative, or professional capacity and thereby exempt from the FLSA's minimum wage and overtime requirements pursuant to 29 U.S.C. 213(a)(1). In 2004, the Department amended the Part 541 regulations, and the current regulations are no longer divided into "General" and "Interpretations" subparts. See 69 Fed. Reg. 22,122.

cant effects on private interests, as legislative rules do." Pet. App. 26a (internal quotation marks and citation omitted); see also *id. at* 63a-64a. Thus, the regulation has the force of law, see *CBS*, 316 U.S. at 416 ("regulations which affect or determine rights generally * * * when lawfully promulgated * * * have the force of law"), and is entitled to *Chevron* deference under *Mead* for that reason, see 533 U.S. at 226-227.

Moreover, labeling a rule as an "interpretation" does not indicate that it is not a binding legislative rule. Here, the title merely indicates that Subpart B provides interpretations of the companionship services exemption that go beyond the basic definitions provided in Subpart A to further delimit the contours of the exemption in 29 U.S.C. 213(a)(15) and provide necessary rules to implement the 1974 Amendments. *Chevron* clearly applies to such agency interpretations contained in a regulation. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). Accordingly, courts of appeals, other than the court below, have applied *Chevron*'s framework to regulations contained in Part 552's "Interpretations" Subpart. See *Madison* v. *Resources for Human Dev., Inc.*, 233 F.3d 175, 181 (3d Cir. 2000) (according *Chevron* deference to 29 C.F.R. 552.101); *McCune* v. *Oregon Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) (upholding 29 C.F.R. 552.106 under *Chevron*). In addition, the Tenth Circuit has twice accorded Section 552.109(a) *Chevron* deference, despite its inclusion in Part 552's "Interpretations" Subpart. See *Johnston* v. *Volunteers of Am., Inc.*, 213 F.3d 559, 562 (10th Cir. 2000), cert. denied, 531 U.S. 1072 (2001); *Welding* v. *Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004).[3]

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[3] Contrary to respondent's argument (Br. in Opp. 13-14), DOL did not intend to adopt the definition of "interpretation" in 29 C.F.R. 790.17(c) for every regulation it placed in a subpart entitled "Interpretations." Section 790.17(c) adopts that definition only as an interpretation of provisions of the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, that provide a defense to employers who prove that they acted "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or

C. *Chevron* Deference Is Appropriate Even If 29 C.F.R. 552.109(a) Is Not A Legislative Rule

Even assuming, *arguendo*, that Section 552.109(a) is not a legislative rule that must be upheld unless it is arbitrary, capricious, or manifestly contrary to the FLSA, it remains a formal and authoritative construction of the Act that warrants deference under *Chevron* and must be sustained as long as it is reasonable. See 467 U.S. at 844. This Court in *Mead* did not hold that *Chevron* deference is appropriate only to interpretations embodied in legislative rules or formal adjudications. To the contrary, the Court specifically held that the want of formal procedure in *Mead* itself did not decide the case, noting that the Court has sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was affected. See 533 U.S. at 231

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interpretation" of certain agencies. 29 U.S.C. 258 and 259(a). In that context, "interpretation" means "a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language,'" including "bulletins, releases, and other statements." 29 C.F.R. 790.17(c); cf. 29 C.F.R. 790.17(b) ("regulation" and "order" mean authoritative and binding rules). Respondent also cites a number of cases allegedly supporting her position that DOL's "interpretations" of statutory exemptions receive only *Skidmore* deference. Br. in Opp. 15. These cases are readily distinguishable because they involved statements or positions adopted without notice and comment. See, *e.g.*, *Freeman* v. *NBC*, 80 F.3d 78, 83-84 (2d Cir. 1996) (concluding that 29 C.F.R. 541.302 is an interpretive regulation because it was not promulgated pursuant to the requirements of the APA); *Reich* v. *New York*, 3 F.3d 581, 587 (2d Cir. 1993) (concluding that 29 C.F.R. 541.205(a), which was not subject to notice and comment, is an interpretive rule), cert. denied, 510 U.S. 1163 (1994); *Brigham* v. *Eugene Water & Elec. Bd.*, 357 F.3d 931, 940 (9th Cir. 2004) (DOL regulations at 29 C.F.R. 785.14-785.23 interpreting the FLSA's "waiting time" provision, which were issued without notice and comment, are "interpretive guidance"). Respondent's argument suffices only to demonstrate that "interpretation" is an ambiguous term that covers agency determinations of varying degrees of formality. That, in turn, provides a reason to defer to the agency (under *Auer*), not a basis to disregard the agency's interpretation of "interpretation."

(citing as an example *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257, 263 (1995)).

This clearly is an occasion for such deference. Section 552.109(a) was promulgated pursuant to notice-and-comment rulemaking (and indeed was revised in response to public comments); it was issued as part of a single comprehensive package containing all "necessary rules" for implementation of the new domestic service coverage and the exemption for companionship services; and it addresses the question at issue directly and with greater specificity than any other regulation. Section 552.109(a) thus bears ample indicia of a considered and official position calling for *Chevron* deference.

II. DOL'S THIRD-PARTY EMPLOYMENT REGULATION IS A PERMISSIBLE INTERPRETATION OF THE FLSA'S COMPANIONSHIP SERVICES EXEMPTION

Under the second step of the *Chevron* analysis, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Under this highly deferential standard, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted * * *, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, courts must defer to any reasonable agency interpretation. *Mead*, 533 U.S. at 229.

The FLSA's companionship services exemption does not specifically address third-party employment. See 29 U.S.C. 213(a)(15). Rather, that issue is within the express grant of rulemaking authority to the Secretary of Labor to "define and delimit" the terms of the exemption. At a minimum, because the statute does not preclude application of the companionship exemption to third-party employment, and because 29 C.F.R. 552.109(a) is a permissible interpretation of congressional intent, the Court must defer to DOL's regulation. Def-

erence would be due, moreover, even under the standard of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because DOL's longstanding third-party employer regulation is most consistent with the statutory text and Congress's intent in enacting the FLSA's exemption for companionship services.

A. DOL's Third-Party Employer Regulation Is Supported By The Text And History Of The FLSA's Companionship Services Exemption

The statutory exemption applies to "*any* employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15) (emphasis added). Congress's use of the encompassing term "any" is naturally read to include all employees providing such services, regardless of who employs them. See, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (internal quotation marks and citation omitted).[4] See Advisory Mem., Pet. App. 51a, 63a-64a.

As DOL explained when it promulgated 29 C.F.R. 552.109(a) (see 40 Fed. Reg. at 7405) and again in its 2005 Advisory Memorandum (see Pet. App. 51a-52a), its conclusion

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[4] It is true that Sections 6(f) and 7(*l*) of the FLSA, which extend minimum wage and overtime protections to domestic service employees, indicate that the term "domestic service" itself should be construed broadly. See 29 U.S.C. 206(f) (minimum wage applies to "*[a]ny* employee * * * employed in domestic service" meeting specified income or hour requirements) (emphasis added); 29 U.S.C. 207(*l*) ("No employer shall employ *any* employee in domestic service in one or more households for a workweek longer than forty hours" unless such employee receives overtime compensation.) (emphasis added). The broad coverage provided by those sections, however, is expressly limited by the exemptions for casual babysitters and companions for the aged and infirm. Moreover, the intended broad coverage is indicated by the word "any," which of course is also used in the exemption. Thus, while Congress wanted "to include within the coverage of the Act all employees whose vocation is domestic service," it expressly *excluded* casual babysitters and companions from that coverage. S. Rep. No. 690, 93d Cong., 2d Sess. 20 (1974); see H.R. Conf. Rep. No. 113, 93d Cong., 1st Sess. 27 (1973).

that the companionship services exemption applies to third-party employers is consistent with interpretations of similarly-worded statutory exemptions that pre-dated the 1974 Amendments. See, *e.g.*, 29 C.F.R. 780.303 (exemption in 29 U.S.C. 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); *Holtville Alfalfa Mills, Inc.* v. *Wyatt*, 230 F.2d 398, 400, 401-402 (9th Cir. 1955) (exemption in 29 U.S.C. 213(a)(6) applies to employee who repaired equipment on a farm even though his employer owned no farm and operated none); *Tipton* v. *Associated Milk Producers, Inc.*, 398 F. Supp. 743, 747 (N.D. Tex. 1975) (same); 29 C.F.R. 780.403 (exemption in 29 U.S.C. 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities"). DOL therefore had a firm basis for defining the scope of the companionship exemption by reference to the activities of the employee rather than the activities of the employer.

If Congress had wanted to exclude employees of third-party employers from the exemption, it easily could have done so by expressly including a limitation based on *employer* status, as it has done with other FLSA exemptions. See, *e.g.*, 29 U.S.C. 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. 213(b)(3) ("any employee of a carrier by air"); 29 U.S.C. 207(i) ("any employee of a retail or service establishment"). Instead, Congress focused on the activity of "any employee" and expressly assigned to the Secretary the authority to determine the appropriate defini-

tions and limits of the exemption, see 29 U.S.C. 213(a)(15), which the Secretary did in 29 C.F.R. 552.109(a).[5]

From the outset of the rulemaking process implementing the 1974 Amendments and the companionship services exemption, DOL intended to address the question of third-party employment in 29 C.F.R. 552.109. See 39 Fed. Reg. at 35,382 (proposed rule); 40 Fed. Reg. at 7404 (final rule). DOL originally proposed using that regulation to provide that companionship services employees "employed by an employer other than the families or households using such services, are not exempt under section 13(a)(15) of the Act if the third party employer is a covered enterprise meeting the tests of sections 3(r) and 3(s)(1) of the Act." 39 Fed. Reg. at 35,385. DOL reasoned that such "employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Ibid.*; see *Homemakers Home & Health Care Servs., Inc.* v. *Carden*, 538 F.2d 98, 100 (6th Cir. 1976). But even as originally proposed, Section 552.109(a) would have applied the exemption to *some* third-party employers—agencies or companies that were not "enterprises" covered by the Act and family members who hired the companion for the aged or infirm person.

After receiving comments from, among others, public and private social service groups, public welfare departments of state and local governments, and business firms providing

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[5] Congress has amended 29 U.S.C. 213 seven times since 1974 and has not made any changes to the exemption. See Pub. L. No. 95-151, 91 Stat. 1245 (1977); Pub. L. No. 96-70, 93 Stat. 452 (1979); Pub. L. No. 101-157, 103 Stat. 938 (1989); Pub. L. No. 103-329, 108 Stat. 2382 (1994); Pub. L. No. 104-88, 109 Stat. 803 (1995); Pub. L. No. 104-188, 110 Stat. 1755 (1996); Pub. L. No. 105-78, 111 Stat. 1467 (1997). This failure to revise or repeal DOL's longstanding interpretation of the companionship exemption "is persuasive evidence that the interpretation is the one intended by Congress," or at least is within the range of discretion Congress conferred on the agency. *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

domestic service workers, DOL revised its rule to exempt all employees providing companionship services, regardless of their employer. See 40 Fed. Reg. at 7405 ("On further consideration, I have concluded that the[] exemption[] can be available to * * * third party employers since [it] appl[ies] to 'any employee' engaged 'in' the enumerated services."). The agency explained that "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." *Ibid.*; see also Advisory Mem., Pet. App. 52a, 53a.[6]

B. The Third-Party Employer Regulation Is Consistent With Congress's Intent In Enacting The Exemption For Companionship Services

Section 552.109(a) also is consistent with Congress's intent in enacting the exemption for companionship services in the first place, and it avoids the disruption to the provision of companionship services to aged and disabled individuals that would result if the regulation were invalidated.

As DOL stated soon after promulgating 29 C.F.R. 552.109, see Op. Ltr. WH-368, 1975 WL 40991 (Nov. 25, 1975), allowing

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[6] DOL's change between its proposed rule in 1974 and the final rule adopted in 1975, in response to comments, is not a reason to deny *Chevron* deference to Section 552.109(a). See *Yellow Transp.*, 537 U.S. at 45 (applying *Chevron* where agency's position changed from proposed rule to final rule). Such modifications are at the very "heart of the rulemaking process." *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 371-372 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). Further, respondent's argument that the third-party employer regulation is procedurally defective under the APA, 5 U.S.C. 551 *et seq.*, is not properly before the Court because it was not timely raised, Pet. App. 38a n.3, and the court of appeals did not decide the issue, *id.* at 27a-28a. The argument is also meritless. DOL satisfied the APA's requirement at 5 U.S.C. 553(b)(3) by setting forth the terms of the proposed Part 552, including the third-party employer regulation, and then issuing a final rule that was a logical outgrowth of the proposal. See 39 Fed. Reg. at 35,383-35,385; *United Steelworkers of Am.* v. *Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1981). Moreover, following notice and comment in 1993, 1995, and 2001, DOL retained Section 552.109(a) as worded. See pp. 4-5, *supra*.

the exemption for all employees providing companionship services, regardless of the identity of their employer, is consistent with Congress's intent to keep such services affordable. See 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick); *Welding*, 353 F.3d at 1217 ("Congress created the companionship services exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.") (internal quotation marks and citation omitted). This affordability concern applies regardless of whether a person needing care employs a companion directly or uses a third-party agency to obtain such services.

Indeed, as DOL recognized when it decided not to revoke the third-party employer regulation in 2002, the cost of companionship services would dramatically increase without the exemption. See 67 Fed. Reg. at 16,668 (citing comments from, among others, the SBA and HHS, expressing concern that extending the FLSA's minimum wage and overtime coverage to companions employed by third parties would increase the cost of such services). That is a concern not only for persons who need those services, but also for third-party providers, whose reimbursement is generally fixed through Medicare and Medicaid, see, *e.g.*, Nat'l Ass'n for Home Care & Hospice, Inc. (NAHC) Amicus Cert. Br. 7-8, and for the federal government, because Medicare and Medicaid together pay more than half of the revenues to freestanding agencies. See 66 Fed. Reg. at 5483 ("40 and 15 percent, respectively").

Eliminating the third-party employer regulation would have a substantial impact on home care beyond increased costs, and could cause disruption in the care that frail elderly and disabled individuals currently receive. For example, a number of home care providers believe that they would need to limit workers to 40 hours of work each week to control costs if the exemption were not available. See, *e.g.*, City of

New York Amici Cert. Br. 8; Home Care Council of New York City Amicus Cert. Br. 8-9. Such a reduction in workers' hours would likely disrupt continuity of care, as many individuals requiring companionship services need care for a significant portion of the day and night, including, in some cases, round-the-clock care. Continuing Care Leadership Coalition Amicus Br. 8. In addition, home care providers have expressed concern that restricting companions to 40 hours of work each week could make it more difficult for those needing care to find it. City of New York Amici Cert. Br. 8, 11. Such difficulties would lead to increased institutionalization, which is contrary to government policy. See *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 599-602 (1999); Exec. Order No. 13,217, 3 C.F.R. 774 (Community-Based Alternatives for Individuals with Disabilities). Nor is it obvious that the caregivers would benefit. Some providers predict that caregivers' total pay would actually be reduced because they would no longer be able to depend on working overtime hours to supplement their income. See New York State Ass'n of Health Care Providers Amicus Cert. Br. 6. Moreover, the effects of limiting the companionship services exemption to individual employment would visit the greatest hardship on those elderly or infirm individuals—for example, those with Alzheimer's disease—who may be incapable of acting as employers. See Home Care Ass'n of New York State Amicus Cert. Br. 17; NAHC Amicus Cert. Br. 6.

Limiting the exemption to individual employment also would deny the companionship exemption where a family member hires a companion for an elderly or infirm relative living in another household. There is no indication in the FLSA itself, or its legislative history, that Congress intended that result. Indeed, consistent with the textual reference to "any employee," there is no legal or policy justification for treating employees providing companionship services differently under the FLSA based on the identity of the employer.

The changing nature of the home care industry highlights the importance of allowing the exemption for all companionship services employees, regardless of their employer. Since Congress enacted the exemption, "[t]he number of for-profit agencies [providing companionship services] * * * increased * * * from 47 in 1975 to 3,129 in 1999." 66 Fed. Reg. at 5483. Given the number of agencies now providing these services, "[i]f the companionship services exemption to the FLSA was narrowed to only those employees hired directly by a family member or the head of household, then the exemption would encompass only 2% of employees providing companionship services in private homes." *Fernandez* v. *Elder Care Option, Inc.*, No. 03-21998 (S.D. Fla. July 29, 2005), slip op. 45-46 (citing 66 Fed. Reg. at 5483), appeal docketed, No. 05-16806 (11th Cir. filed Dec. 5, 2005). Such an outcome would not be consistent with Congress's intent to ensure the availability and affordability of those services for working Americans.

C. DOL's Third-Party Employer Regulation Is Consistent With Other DOL Regulations

The court of appeals on remand acknowledged that consideration of congressional intent "does not lead to any definitive conclusion" about the validity of Section 552.109(a). Pet. App. 4a-5a. The court nonetheless invalidated that longstanding regulation because it concluded that it is inconsistent with other DOL regulations, particularly 29 C.F.R. 552.3, which the court believed clearly limit the companionship services exemption to employees working in the private home of the person by whom she is employed. Pet. App. 4a-5a, 30a. Section 552.3's general definition of "domestic service employment," however, does not support disregarding Section 552.109(a)'s specific treatment of third-party employers.

At the time the regulation was promulgated, DOL demonstrated its understanding that Section 552.3 did not resolve the issue of third-party employment by including a separate section expressly addressing the subject in the context of

companionship services, Section 552.109. See 40 Fed. Reg. at 7407. If the definition of domestic service employment in Section 552.3 had already excluded employees of third parties, there would have been no point to the promulgation of Section 552.109(a). But DOL *did* promulgate Section 552.109(a), which expressly includes employees of third parties within the exemption. DOL surely did not intend, in the same rulemaking, to both exclude such third-party employees from the exemption under Section 552.3 and include them under Section 552.109(a). To be sure, Section 552.3 could have referred to the home "of the person by" *or for* "whom he or she is employed." But the absence of such language cannot suffice to defeat the specific direction provided by Section 552.109(a). Moreover, although the court of appeals believed that the version of Section 552.109 proposed by DOL in 1974 supported its conclusion, see Pet. App. 13a, 30a-31a, it does not. As originally proposed, Section 552.109 would have applied the exemption to some third-party employers (*i.e.*, those that did not satisfy the "enterprise" test for coverage), and family members living in another household), and therefore even the original proposal would have been inconsistent with the court of appeals' reading of Section 552.3.

As DOL's Advisory Memorandum explains, Section 552.3 does not limit the companionship services exemption to individual employment, because its general definition of domestic service employment addresses not the status of the employer, but rather types of covered services and where they must be provided. Section 552.109(a) is the *only* regulation that addresses third-party employment. See Pet. App. 51a-63a. The agency's interpretation of its own regulations is entitled to controlling deference. *Auer*, 519 U.S. at 461-463. Section 552.3 does incorporate language from the Act's legislative history in its definition of "domestic service employment" as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3; see also

Advisory Mem., Pet. App. 57a-59a. However, when DOL borrowed this language from the congressional committee reports, it intended to adopt Congress's emphasis on the nature of the *employee's activities* and the *place* where those activities are performed; it did not intend to impose any limitation on the identity or status of the *employer*. See *id.* at 58a-59a.

As DOL pointed out in its Advisory Memorandum, Congress never directly addressed the issue of employer identity during its consideration of the companionship services exemption but, rather, focused on the employee's activities and where those activities are performed. Pet. App. 52a-53a, 57a-58a. The legislative history refers to regulations addressing "[d]omestic service in a private home of the employer" in the Social Security context, 26 C.F.R. 31.3121(a)(7)-1(a)(2), and a "generally accepted meaning" of the term "domestic service" that "relates to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed," S. Rep. No. 300, 93d Cong., 1st Sess. 22 (1973), to address the kind of work that Congress sought to cover as "domestic service." Those references do not establish an intent to limit either FLSA coverage of domestic service employees, or the companionship services exemption, based on the identity of the employer. See Advisory Mem., Pet. App. 52a-53a, 57a-58a. Instead, in addressing the companionship exemption, "[m]ost of the statements of the Congressmen focus on the nature of companionship services (e.g., 'elder-sitting' or providing companionship to an elderly person through conversation and shared activities) and the location of such services (ensuring affordable care for the elderly within their own homes), rather than the employer." *Fernandez*, slip op. 44-45.[7]

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[7] Under the Social Security system, a tax is imposed on wages and benefits are based on wages. See 26 U.S.C. 3101(a) and (b); 42 U.S.C. 402(a), 415. "Wages" generally means all remuneration for employment. 26 U.S.C. 3121(a); 42 U.S.C. 409(a). One exception excludes wages below a certain threshold paid for "domestic service in a private home of the employer." 26 U.S.C.

Moreover, the committee reports' description of the individuals who would benefit from the companionship services exemption, namely, individuals who are "unable to care for themselves," H.R. Rep. No. 913, 93d Cong., 2d Sess. 46 (1974); see also S. Rep. No. 690, 93d Cong., 2d Sess. 20 (1974), suggests that Congress did not intend to exclude those most acutely in need of help—*i.e.*, individuals who are not capable of acting as an employer. See, *e.g.*, Home Care Ass'n of NY State Amicus Cert. Br. 17. Thus, Section 552.3 should not be read as having so limited the companionship services exemption.[8]

D. Invalidating DOL's Third-Party Employer Regulation Would Have Substantial Negative Consequences

Respondent's and the court of appeals' contrary reading of Section 552.3 as excluding third-party employment would create a number of other problems. First, that reading would create an inconsistency with DOL's regulation at 29 C.F.R. 552.101, which elaborates on the definition of domestic service employment set out in Section 552.3. Section 552.101 states that "the term [domestic service employment] includes persons who are frequently referred to as 'private household workers.'" 29 C.F.R. 552.101(a). Both DOL and Congress

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3121(a)(7)(A) and (B); 42 U.S.C. 409(a)(6)(A) and (B). The Social Security regulations to which the legislative history of the 1974 Amendments referred address the kind of work that qualifies for this exception. That work differs in some respects from another kind of "domestic service" performed by college students in college clubs, fraternities, and sororities that is not considered "employment" for Social Security purposes pursuant to 26 U.S.C. 3121(b)(2) and 42 U.S.C. 410(a)(2). See 26 C.F.R. 31.3121(b)(2)-1; 20 C.F.R. 404.1009(b) (1974). The existence of both types of "domestic service" in the Social Security regulations highlights that the "private home of the employer" language in the FLSA's legislative history was used to distinguish domestic service performed *in a private home* from such service performed in a different setting.

[8] DOL's references to domestic services in the home "of the employer," in describing the scope of coverage for babysitters, see 29 C.F.R. 552.105(a), like the references in 29 C.F.R. 552.3 and 552.101(a), is used to distinguish service in a private household from service outside the household.

understood the phrase "private household workers" to include employees of third-party employers. Advisory Mem., Pet. App. 61a-62a (citing references in legislative history to DOL's 1973 Report to Congress defining "private household workers" as "anyone aged 14 and over working for wages * * * in or about a private residence who was employed by * * * a household service business whose services had been requested by a member of the household occupying that residence"). Because Section 552.101(a) thus includes at least some domestic workers employed by third parties within the definition of domestic service employees, it makes no sense to construe Section 552.3's language that domestic service be performed "in or about the private home of the employer" as excluding them. *Id.* at 62a.

Second, reading Section 552.3 as excluding third-party employment would affect not only the scope of the exemption but would actually exclude many domestic service workers from FLSA coverage in the first instance, despite Congress's intent to cover "*all* employees whose vocation is domestic service," with the exception only of casual babysitters and companions for the aged and infirm. S. Rep. No. 690, *supra*, at 20 (emphasis added); see also H.R. Conf. Rep. No. 413, 93d Cong., 1st Sess. 27 (1973) (same).[9] Before the 1974 Amendments, two categories of domestic workers generally were not covered under the Act: those employed by homeowners because there usually was no basis for individual coverage, and those employed by third parties that did not meet the test for enterprise coverage. See 29 U.S.C. 203(s) (1970) (defining "covered enterprises" as businesses with annual gross sales of at least $250,000 that employed at least two employees in

[9] As DOL explained in its Advisory Memorandum, although Section 552.3 states that it defines domestic service employment "[a]s used in section 13(a)(15) of the Act," "the Department in fact intended the provision to supply a general definition of the term as used throughout the Act." Pet. App. 60a n.1. Thus, Section 552.3's definition applies equally to the general coverage of domestic service workers and the companionship services exemption.

interstate commerce). Congress clearly intended the 1974 Amendments generally to cover both of those categories of workers, with a few expressly enumerated exceptions, such as for companions. See S. Rep. No. 690, *supra*, at 20; H.R. Conf. Rep. No. 413, *supra*, at 27 (same). But if Section 552.3 were construed to exclude third-party employers from the definition of domestic service employment, then those domestic workers who are employed by third-party employers that are not covered enterprises would, to this day, not be covered by the FLSA. That result is contrary to clear congressional intent. Advisory Mem., Pet. App. 60a.

DOL's reading of Sections 552.3 and 552.109(a) as complementary (with only the latter specifically addressing the question here), rather than contradictory, gives effect to each provision and is therefore consistent with the obligation to read a regulation "so as to give effect, if possible, to all of its provisions." *Jay* v. *Boyd*, 351 U.S. 345, 360 (1956). Moreover, DOL's statement in its Advisory Memorandum that "[t]he regulations address the issue of third-party employment in only one place—section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption," Pet. App. 54a,—is itself entitled to controlling deference, as is DOL's full and fair consideration of its own regulations expressed in this brief. See *Auer*, 519 U.S. at 461-463 (controlling deference to DOL's interpretation of FLSA regulation expressed in amicus brief to the Court). Thus, this Court should conclude that there is no conflict between Sections 552.3 and 552.109(a), and that Section 552.109(a) alone—and permissibly—addresses the question of third-party employment.[10]

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[10] DOL's previous statements in its notices of proposed rulemaking that Sections 552.3 and 552.109(a) were inconsistent, see, *e.g.*, 66 Fed. Reg. at 5485, are entitled to little weight because they were expressed in proposed amendments to Section 552.109 that were never promulgated as a final rule. See *Schor*, 478 U.S. at 845 ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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is entitled to consider alternative interpretations before settling on the view it considers most sound."). In any event, the Advisory Memorandum expressly repudiates and withdraws those and all other previous inconsistent statements, thus clarifying any ambiguity they may have caused. Pet. App. 63a; see, *e.g.*, Wage and Hour Division, Field Operations Handbook § 11d00(c) (1994).

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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARY ANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* CONTINUING CARE LEADERSHIP COALITION, INC. IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* CONTINUING CARE LEADERSHIP COALITION, INC. IN SUPPORT OF PETITIONERS

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* the Continuing Care Leadership Coalition ("CCLC") in support of the Petition for Writ of Certiorari filed by Petitioner Long Island Care at Home, Ltd. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

[1] No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Continuing Care Leadership Coalition (CCLC) represents the interests of more than 100 not-for-profit and public organizations providing long term care services in New York State. Our membership includes forty-three mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals in their homes. The remainder of our membership relies heavily on the existing home care system in order to provide a full range of long term care services to older and disabled individuals in nursing facilities, adult day health care programs, and other community-based services.

Specifically, CCLC supports and promotes high-quality, cost-effective long term care services for citizens of New York on behalf of its long term care provider members. CCLC acts as an advocate for its members with respect to issues pertaining to payment and reimbursement, policy analysis and implementation, regulatory and professional affairs and, in that capacity, is familiar with the circumstances facing its members and the potential impact of this case.

The issue before the Court is of exceptional importance to CCLC and its member organizations, and CCLC is in a unique position to describe the potentially severe negative impact of the decision below—that the third-party employer exemption in 29 C.F.R. § 522.109(a) is unenforceable[2]—on health care providers in New York State.

Indeed, CCLC's members and their affiliates will be severely injured by increased costs for home care services, costs that cannot be absorbed by a financially fragile class of providers that disproportionately relies on government reimbursement. Thus, the outcome of this case is of critical importance to the immediate and future financial viability of

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[2] *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2d Cir. 2006).

CCLC's members and their affiliates and their ability to provide needed services to elderly and disabled residents of New York.

SUMMARY OF ARGUMENT

Since the 1970s New York State has structured home care service delivery upon long-standing regulations promulgated by the Department of Labor, which provided a third party employer exemption from federal minimum wage and overtime pay requirements. Within the past two years, these long-standing regulations were a key factor in the successful labor-management bargaining process. The court below invalidated these long-standing regulations, which has the grave potential to destabilize home care service delivery, to adversely affect other long term care providers that rely heavily on the availability of home care services, and to negatively impact the broader health care system in New York.

Specifically, the decision below works against many recent advancements in care for the disabled, moving backward from the seminal *Olmstead*[3] decision, which requires states to provide services in the least restrictive and most appropriate setting. Additionally, the decision below threatens New York's innovative managed long term care program, which allows frail older people to remain in the community and receive health care services through a capitated financing arrangement.

Furthermore if the decision below stands, it will have a severe negative impact on tens of thousands of older and disabled individuals receiving home care services through CCLC's member provider organizations. The decision will drive home care costs up, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement.

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[3] *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Therefore, CCLC respectfully requests that the Court grant Long Island Care at Home's Petition for Writ of Certiorari.

ARGUMENT

INTRODUCTION

In 2005, this Court granted the Petition of Long Island Care at Home and remanded this case to the U.S. Court of Appeals for the Second Circuit below in light of the U.S. Department of Labor's December 1, 2005, Wage and Hour Advisory Memorandum ("DOL Memorandum").[4] In this brief, CCLC describes the problems that have resulted since the lower court's decisions in July 2004 and the problems that are expected as a result of the court's decision in August 2006. Specifically, CCLC updates the Court citing anecdotal evidence from member home health care agency staff who provided CCLC with examples of how the lower court's decision is negatively affecting the health care system.

I. THE INVALIDATION OF THE THIRD PARTY EMPLOYER EXEMPTION SEVERELY UNDERMINE'S NEW YORK'S HEALTH CARE SYSTEM AND THE QUALITY OF CARE TO ITS PATIENTS

The lower court's invalidation of the third party employer exemption has directly increased expenses for financially fragile long term care organizations that operate home health care agencies and is beginning to affect other components of the health care system that rely on home health care services. The resulting disruption in continuity of care is negatively affecting the patients receiving and seeking home health care services.

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[4] Department of Labor, Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005) *available at* www.dol.gov/esa/whd/FOH/AdvisoryMemoranda205.pdf.

A. The Decision Below Is Having a Severe Negative Impact on the Long Term Care System in New York

1. *Impact on the Long Term Care System*

The decision below has resulted in an immediate negative impact on the long term care system and the situation is expected to worsen should the Court fail to intervene. Long term care organizations provide an essential service to patients and families by caring for New York's older and disabled population. The continuing care system consists of various components including but not limited to skilled nursing care, home health care, managed long term care, subacute care, and adult day health care. CCLC's member organizations, in particular, also provide long term care for a variety of specialty populations beyond the frail elderly that include children, people with HIV/AIDS, people with Alzheimer's Disease or dementias, people with traumatic brain injury, people with Huntington's disease, and the visually or hearing impaired.

Long term care providers in New York and throughout the nation rely heavily on governmental payments that typically do not fully cover current operating costs. This contributes significantly to that fact that a substantial proportion of long term care providers are financially at risk.[5] Based upon CCLC's analysis of 2004 audited financial statements for home health care agencies, nearly half (55 or 48%) of 115 certified home health care agencies and more than half (64 or 63%) of 102 long term home health care agencies in New York State are losing money. Additionally, more than half

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[5] Robyn Stone, Long Term Care for the Elderly with Disabilities: Current Policy Emerging Trends, and Implications for the Twenty-first Century, Milbank Memorial Fund, (2000) *available at* http://www.milbank.org/reports/0008stone/. *See also* BDO Seidman, A Report on Shortfalls in Medicaid Funding for Nursing Home Care (Apr. 2005) *available at* http://www.ahca.org/brief/bdo_seidman_study.pdf.

(51%) of New York State's nursing facilities, many of which sponsor home health care programs, are losing money.

As a result of the decision below, CCLC's member home health care agencies ("CCLC's agencies") have experienced increased costs. Although most of CCLC's agencies do not directly employ home health care aides, CCLC's agencies provide skilled services, such as nursing, medical care, and therapy, and contract out to licensed home care services agencies (LHCSAs) for paraprofessional services. Since this lower court's decision, LHCSAs have been forced to decrease the amount of hours worked by home health care aides in order to remain in business. As a result, CCLC agencies have experienced increased costs for the additional nurse supervision needed to oversee a greater number of aides working fewer hours. To maintain a high quality of care for their patients, CCLC agencies have also experienced increased costs for training additional numbers of home health care aides that LHCSAs have employed to meet patient care needs while working fewer individual hours, even though the aides are not direct employees of CCLC agencies.

2. *Impact on Long Term Care Reform*

The decision below will also work to undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a core element of our long term care system, New York has maintained a commitment to offering long term care services in the least restrictive setting, which it has done by supporting and encouraging the delivery of care in home and community-based settings. New York's commitment to home care is consistent with the U.S. Supreme Court's decision in *Olmstead*,[6] which found that state and public agencies must

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[6] *Olmstead*, 527 U.S. at 581.

make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The generous mix of home and community-based programs available to older and disabled people in New York has helped over 121,000 older New Yorkers continue to live in the community with the needed supports.[7]

In addition, the decision below and the resulting inevitable increase in costs for home health agencies will damage the progress the State has made in piloting innovative ways to help older and disabled individuals remain in the community[8] and efforts to reform the long term care system for the future.[9] Together with various home and community-based long term care options in New York, including the unique managed long term care program, New York relies on home care to complete its vision for the future of long term care in New York State.[10] Managed long term care programs allow

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[7] Neil P. Benjamin, Assistant Director, Division of Health Facility Planning, New York State Department of Health, Attachment to Memorandum to Members of the Planning Committee and the Codes and Regulations Committee (Jan. 17, 2003) (submitted to consider use of home and community services in the development of a revised methodology to update the nursing home utilization data).

[8] New York State Department of Health, Consumer Guide to Community-Based Long Term Care (Apr. 2006) *available at* http://www.nyhealth.gov/health_care/medicaid/program/longterm/.

[9] New York State Department of Health Office of Medicaid Management, Restructuring Long Term Care in New York State, 21 DOH Medicaid Update 6 (June 2006) *available at* http://www.health.state.ny.us/health_care/medicaid/program/update/2006/jun2006.htm. *See also* Commission on Health Care Facilities in the 21st Century, Long Term Care (July 2005) *available at* http://www.nyhealthcarecommission.org/docs/ltc.pdf.

[10] New York State Department of Health, Managed Long Term Care Final Report (Mar. 2006) *available at* http://www.health.state.ny.us/health_care/managed_care/mltc/pdf/mltc_final_rep.pdf.

more than 15,000 frail older and disabled New Yorkers to remain in the community and receive needed long term care services.[11] In addition, the lower court's decision will disrupt other components of the long term care system that allow individuals to remain in the community and that rely on home health care services, such as adult day health care, long term home health care or "nursing home without walls" program, and senior housing.

3. *Impact on Home Care Wage and Benefit Negotiations*

The decision below has destabilized the labor-management achievements in New York and is negatively affecting the job quality of home health care workers. Long term care providers share an interest in paying home care workers a reasonable wage and benefit package in order to retain talented staff. As home care agencies grapple with a limited supply of talented staff as a result of workforce shortages and the projected demand for long term care workers to care for our aging population, they have made progress toward achieving important wage and benefit increases, reflected in 2004 labor negotiations.[12] However, the lower court's decision has significantly undermined achievements made between labor and management.

CCLC's agencies report that as a result of the lower court's decision, aides who typically worked on long-hour cases, when a patient requires 24-hour care through the night, are now working fewer hours per week for multiple agencies.

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[11] New York State Department of Health, Managed Long Term Care Enrollment by Provider and County (June 2006) *available at* http://www.health.state.ny.us/health_care/managed_care/reports/enrollment/monthly/2006/docs/ en6_06.pdf.

[12] Lisa Colangelo, Aides Strike Ends, N. Y. Daily News (June 10, 2004) at 44., *See also* Steven Greenhouse, Health Care Agency Ends Strike, N. Y. Times (June 19, 2004) at B8.

The continuity of care for the patient is being disrupted and aides had who worked long-hour cases are now less able to develop the strong relationships with patients needed to build a high level of trust and to support optimal quality of care. In sum, CCLC agencies report that the lower court's decision has transformed a reliable profession known for its strong caregiver-patient relationship and created an erratic work week for aides, who are finding it difficult to develop the bonds needed to provide the high quality care for their patients that they once could easily do. Such a decrease in job quality will result in increased turnover for home health aides and will deter people from entering the field.

B. The Decision Below Is Having a Severe Negative Impact on the Continuum of Care in New York

1. *Impact on the Flow of Health Care*

The Court of Appeals' prior decision is beginning to obstruct the flow of health care delivery between hospitals and home health care agencies. Home health care services are an essential part of the continuum of care for patients who receive both long term and acute care services. Hospitals rely on home health agencies to receive patients that can be discharged home, rather than having patients linger in the hospital for longer than necessary. For patients that are seeking long-hour home health care services, CCLC agencies are receiving complaints from hospitals about the hospitals' inability to find placement for patients.

More generally, the decision below, by creating disruptions in the continuity of care provided by home health agencies, impairs the ability of hospitals to discharge patients to more appropriate home and community-based settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of the most

recently available audited financial statements from hospitals in 2002, CCLC estimates that a one day increase in the length of stay for patients in New York hospitals who are discharged to home health agencies would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, an additional day will increase costs to hospitals, the State, local governments, the federal government, and the workers' compensation system. In addition to this undesirable economic effect, an increased length of stay will result in less access to hospital beds for patients who need them.

2. *Impact on Home Care Patients*

The lower court's invalidation of the third party employer exemption is limiting the flexibility currently treasured by many thousands of patients receiving home health care and personal care services through the Medicaid program. To comply with the Court of Appeals' prior decision, home health care agencies, unable to afford costs that are not covered by government reimbursements, are being forced to decrease or eliminate overtime hours and increase part-time staff. In essence, the lower court's decision is fracturing the continuity of care for home care patients and severing multi-year relationships between patients and caregivers. The court's decision is also negatively affecting families who directly provide informal care to patients, or who oversee the care of loved ones. Home care is often one of the services that enable family caregivers to maintain their loved ones in the community and to allow family members to receive some respite in order to remain employed, or to replenish their energy to continue caring for their loved one at home. These unintended results, as well as the potential for uncovered shifts, will severely limit access for all individuals needing home care.

This cannot be the result. Now is the time to ameliorate the negative impacts that have arisen since the decision below.

The Supreme Court must give the relevant statutory sections their intended meaning and purpose and ensure that the third party employer exemption in 29 C.F.R. § 552.109(a) be upheld. Otherwise, the Court's decisions would exacerbate the severe and immediate impacts that are already taking a toll on older and disabled individuals receiving companionship services and on the health care system overall in New York State.

CONCLUSION

For all of the aforementioned reasons, CCLC respectfully requests that the Court grant Long Island Care at Home's Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* HOME CARE ASSOCIATION OF NEW YORK STATE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS* [2]

Amicus Home Care Association of New York State, Inc. ("HCA" or "Home Care Association") is a not-for-profit organization that promotes and supports high-quality, cost-

[1] *Amicus* certifies that this brief was authored in whole by counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person or entity made any monetary contribution to the preparation or submission of this brief.

[2] The written consents of the parties were requested and both parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

effective home care and community services for the citizens of New York State. The Association has approximately 250 members, most of which are non-profit and governmental home care provider agencies, and some of which are for-profit providers. HCA's members serve the majority of New York's Medicare and Medicaid beneficiaries receiving home care services, including 250,000 persons in New York City alone. HCA participated as an *amicus* when this case was formerly before the Court, and also as an *amicus* in the court of appeals on the remand.

The Second Circuit's decision if left in place would impose a devastating burden on the ability of HCA's provider members to provide high quality, affordable companionship services to elderly and infirm patients throughout New York State by invalidating a long-standing regulation of the United States Department of Labor ("DOL" or "agency") that exempts home care companionship services from federal wage and overtime laws under the Fair Labor Standards Act ("FLSA"). The rule at issue implements a statutory exemption that Congress enacted for the express purpose of making these domestic companionship services more widely available to those who need them, thus allowing them to avoid less desirable alternatives such as nursing home placement.

Hundreds of providers, including HCA's members, have relied for over thirty years on the rule invalidated by the Second Circuit to develop companionship services that have kept hundreds of thousands of people in their homes and communities. The importance of the exemption in achieving these goals was recognized by the agency after extensive rulemaking proceedings when it adopted the regulation in 1975 and when it determined to retain the rule in 2002, and again when it issued an extensive Advisory Memorandum last year reaffirming the rule and confirming that it represented the agency's considered exercise of its delegated rulemaking authority.

The Home Care Association accordingly urges this Court to grant the Petition for Certiorari so that it can review the Second Circuit's rulings and eliminate the serious harms that invalidation of the rule creates for providers in New York State, and the uncertainties it creates for providers in other jurisdictions.

SUMMARY OF ARGUMENT

The Second Circuit's rulings misapply this Court's precedent and ignore the sound policy reasons invoked by Congress and the agency in enacting and continuing the longstanding exemption for home companionship services. Rejecting the views of every other court to have considered the matter, including the Tenth Circuit, the Second Circuit invalidated the regulation even though it (a) was the subject of two full rounds of notice and comment rulemaking, (b) has been in place for thirty years with the acquiescence of Congress, and (c) is fully consistent with the language of the governing statute. Remarkably, the Second Circuit reached its conclusion even though it concluded that the result reached by the agency was not contrary to the language of the statute or any other authoritative expression of Congress' intent and purpose. Indeed, it conceded on remand from this Court that "[c]onsideration of Congressional intent . . . does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)." Pet. App. at 5a.

The Second Circuit's decision thus conflicts with numerous decisions of this Court, including *United States v. Mead Corp.*, 533 U.S. 218 (2001) ("*Mead*"), which requires full deference to an agency decision issued after formal consideration through procedures such as notice and comment rulemaking; *Alaska Department of Environmental Conservation v. EPA*, 124 S. Ct. 983 (2004), which grants "particular deference" to agency interpretations of "longstanding duration;" and *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc. ("Chevron")*, 467 U.S. 837 (1984), which re-

quires courts to defer to reasonable agency constructions of statutes they are charged to administer unless Congress has foreclosed the agency's construction by speaking directly to the contrary. The Second Circuit's assertion that deference was not appropriate because the agency chose to label the regulation as an "interpretation" is likewise inconsistent with a host of sound precedents that reject mechanical invocations of form over substance. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir 2000)(finding it "well-established" that the key question is not the agency's "labeling" of the rule, but whether the "interpretation" carries the "force and effect of law.")

The Second Circuit decisions thus create the very result that sound principles of administrative review are intended to avoid. They upset a reasonable and longstanding agency rule, around which important and necessary health care arrangements have been made for decades, without any consideration of the harmful effects of that holding.

As set out in submissions by numerous affected parties to the Second Circuit and to this Court when the case was last before it, the exemption of domestic companionship services under the FLSA is critical to the quality of care. The budgets of HCA's provider members are severely constrained and dependent on government reimbursements, predominantly Medicaid, that are themselves decreasing due to state budget constraints and under-reimbursements. *See* Pet. App. at 104a-105a. Unable to fund the significantly increased overtime payments the Second Circuit's rulings mandate, providers will be forced to staff home companion cases on shorter shifts, thus requiring more caregivers per case. *Id.* at 106a. This will reduce the continuity of care to recipients of home companionship services, increase the time needed to train multiple caregivers on the same case, and reduce wages and other compensation to home care workers who will no longer be offered the opportunity to work overtime hours. Providers

will also be forced to seek additional workers at a time when staffing shortages already exist, and when new regulatory requirements are further limiting the availability of workers. *Id.*

The Second Circuit's decisions create a circuit split on an issue of great significance to the Home Care Association and others with an interest in the provision of home companion services, and will effect a massive disruption to the delicately balanced system that makes home care – a desired alternative to institutionalization – an affordable and safe option for tens of thousands of home care patients in New York State. They also ignore the plain language of the statute, are contrary to Congress' intent, and violate numerous principles of administrative review that require particular deference to the agency under the circumstances of this case. This Court should therefore grant the Petition for Certiorari so that it may review and reverse the Second Circuit's rulings.

ARGUMENT

I. THE SECOND CIRCUIT'S RULINGS CONTRAVENE ESTABLISHED PRINCIPLES OF ADMINISTRATIVE REVIEW AND AGENCY DEFERENCE BY REJECTING AN AGENCY STATUTORY CONSTRUCTION THAT THE COURT ADMITTED WAS NOT INCONSISTENT WITH EITHER THE TEXT OR THE PURPOSE OF THE STATUTE.

A. The Rule Invalidated By The Second Circuit Is Fully Consistent With The Text Of The Statute And Its Legislative History.

The statutory exemption at issue, codified at 29 U.S.C. § 213 (a)(15), applies to

> any employee employed on a casual basis in domestic service employment to provide babysitting services or

> any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary) . . .

This statutory language applies by its terms to any employee providing companionship services in domestic service employment. It does not exclude employees employed by third parties. No statutory language makes *any* reference to third party employers. The Second Circuit's rulings are thus unsupported by the plain language of the statute. *See Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)("It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms," quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*, 530 U.S. 1 (2000)).

The descriptions of the exemption in the legislative history are likewise broad and make no reference to any such limitation of the statutory exemption.[3] Indeed, the relevant legislative history expressly recognizes the need to allow elderly and infirm individuals to remain in their own homes rather than being displaced to nursing homes. As noted in floor debate on the bill, compliance with federal wage and overtime requirements would "increase tremendously the cost

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[3] *See* H.R. Rep. No. 93-913, (1974) *reprinted in* 1974 U.S.C.C.A.N. 2811, 2821 (noting that "the provision does not apply to a person who, on an intermittent basis, provides baby sitting services, or who provides companion services."); *id.* at 2845 ("the exemption reflects the intent of the committee to exclude from coverage babysitters for whom domestic service is a casual form of employment and companions for individuals who are unable because of age and infirmity to care for themselves."); H. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865 ("The conference substitute retains the exemption for casual babysitters and companions contained in both bills and retains the overtime exemption for "live in" domestic employees.")

of taking care of our older people, perhaps forc[ing] into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes." 118 Cong. Rec. 24,715 (1972)(comments of Sen. Taft). The Second Circuit nonetheless overturned DOL's longstanding rule exempting all employees providing home companionship services, thus substantially disrupting the provision of such services in New York (and other states governed by the ruling), and adversely affecting the very health care workers the decision purportedly seeks to protect by reducing their opportunities for overtime and hence their overall compensation.[4]

In its first decision the Second Circuit purported to find that the rule was inconsistent with the "context of the entire statutory and regulatory scheme," Pet. App. at 8a, and asserted that it is "implausible" Congress "would have wanted" the rule. *Id.* at 30a. In its decision on remand from this Court, however, the Second Circuit abandoned reliance on this ground, acknowledging that it could reach no "definitive conclusion" as to Congress' intent. *Id.* at 5a. The appeals court nonetheless improperly refused to defer to the agency's resolution of the matter.

The Second Circuit's refusal to defer to an agency construction not contrary to the plainly expressed intent of Congress runs squarely contrary to the principles of *Chevron* as applied by this Court. As this Court noted in *Rust v. Sullivan*, 500 U.S. 173, 184 (1991), "[i]f a statute is 'silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' *Chevron*, 467 U.S. at 842-843." This Court went on to hold:

> The Secretary's construction . . . may not be disturbed as an abuse of discretion if it reflects a plausible con-

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[4] The Second Circuit by contrast explicitly considered statements from the legislative history in its discussion of 29 C.F.R. § 552.6, and upheld that regulation. *See* Pet. App. at 17a-18a, 21a-22a.

> struction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. Ibid. In determining whether a construction is permissible, "[t]he court need not conclude that the agency construction was the only one it could permissibly have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.*, at 843, n. 11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it. *Id.*, at 844.

Id.

The Second Circuit's refusal to defer to the agency's construction was particularly inappropriate given that Congress has amended the Act *seven* times since the rule was promulgated in 1975, without disturbing the rule in any way.[5] This Court has repeatedly admonished that longstanding agency interpretations are to be given "particular deference." *See, e.g., Alaska Department of Environmental Conservation v. EPA*, 540 U.S. at 487 (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002), and *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.12 (1982)). Instead, the court of appeals simply substituted its own view of the exemption for that of the agency.

In sum, far from precluding the DOL rule, both the statutory text and the legislative history support it, as neither suggests any limitation of the exemption based on whether the domestic companions are employed by the patient, the family, or a third party. The Second Circuit's decision to

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[5] "It merits emphasis, however, that prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo. In statutory matters, judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied." *Hibbs v. Winn*, 542 U.S. 88 (Stevens, J., concurring).

invalidate the rule squarely contravenes numerous decisions of this Court requiring deference in such circumstances to the judgments made by the agency charged with administering the statute, particularly where, as here, Congress has not disturbed the agency's longstanding interpretation.

B. The Second Circuit's Reasons For Declining To Grant Deference Are Erroneous.

Unable to point to anything in the text of the statute or its legislative history that required invalidating the DOL rule, the Second Circuit devoted much of its attention to a discussion of the appropriate level of deference owed the agency. *See Chevron*, 467 U.S. at 842-43 & n.9 (deference to the agency is required if "Congress has not directly addressed the precise question at issue"). The Second Circuit acknowledged that "[a]ll courts that have considered § 552.109(a) have accorded it *Chevron* deference." Pet. App. at 25a. Nonetheless, the Second Circuit held that *Chevron* deference was not appropriate, and then proceeded to give the agency's rule effectively no deference at all. The Second Circuit's analysis on this point was erroneous and inconsistent with the precedents of this Court and of other courts of appeals.

The Second Circuit's determination that *Chevron* deference was not required was based on its conclusions that the rule was "interpretive," rather than legislative, and that the notice and comment procedure undertaken by the agency "was not required." Pet. App. at 27a. Both of these conclusions were wrong, as was the Second Circuit's illogical leap from them to the further conclusion that the use of notice and comment procedures should not confer *Chevron* deference under *Mead* if the notice and comment is undertaken voluntarily.

The Second Circuit's holding that the rule was "interpretive" was based on the agency's placement of the rule under the heading "Subpart B- Interpretations," and on the agency's supposedly "self-conscious" admission that the rule was not

issued under the delegated authority of 29 U.S.C. § 213(a)(15). Pet. App. at 26a-27a. The Second Circuit conceded, however, that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," *id.* at 26a, and that it "was promulgated following notice and comment procedures." *Id.* at 25a. Moreover, the effect of the rule is to define which employees providing companionship services are subject to the exemption – precisely the task that Congress delegated to the agency by statute.

Other than its reliance on the agency's label, however, the Second Circuit did not explain why the rule defining companionship services should be considered legislative, while the rule exempting such services if provided in the home should be considered non-legislative. Indeed, under the Second Circuit's reasoning, the agency could have achieved full deference merely by relabeling the rule and adding a citation in the Federal Register. This result is both illogical and directly contrary to this Court's decision in *Auer v. Robbins*, 519 U.S. 452, 455-56 (1997), which granted *Chevron* deference to a DOL regulation that, like § 552.109(a), was also contained in a subpart labeled "Interpretations."

The Second Circuit erred in relying on the agency's labeling of its rule, rather than on its substance and the actual circumstances of its issuance. Courts have made clear in a variety of contexts that the substance of an agency's rule governs, not its label. *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005), ("fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule,"); *Appalachian Power*, 208 F.3d at 1024 (it is "well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation;" question is whether

the "interpretation" carries the "force and effect of law.") The Second Circuit was thus wrong to conclude that, simply because the rule was labeled "interpretive," the notice and comment procedures provided by the agency were gratuitous and not required by law.

As noted above, the Second Circuit conceded that the rule affected substantive rights and obligations "as legislative regulations do." Pet. App. at 26a. The Second Circuit also effectively conceded that the rule was intended to have the "force and effect of law" when it noted that the rule's enforcement would preclude Respondent's claims for minimum wage and overtime compensation, and consequently declared that the rule "cannot be enforced." Pet. App. at 8a, 32a. If the rule were truly interpretive, and not legislative, there would have been no need to declare it "unenforceable." The Second Circuit cited no authority supporting its conclusion that, under such circumstances, the rule was properly classified as "interpretive" and thus was not subject to notice and comment rulemaking.[6]

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[6] The only case the Second Circuit cited on the point, *American Postal Workers' Union ("APWU") v. USPS*, 707 F.2d 548 (D.C. Cir. 1983), was decided before *Chevron* and did not deal with the question of deference at all. Unlike the present case, the rule at issue in *APWU* was *not* subjected to notice and comment rulemaking, and did not "fill in the gaps" because Congress had set out a detailed formula on the matter at issue rather than expressly leaving the matter to agency rulemaking. *See APWU*, 707 F.2d at 559. Moreover, in *APWU*, the agency conceded it was not acting pursuant to statutory authority and was merely implementing a prior interpretation by the Comptroller General. Here, by contrast, the agency has expressly asserted that the rule was promulgated "pursuant to its express statutory authority . . . to define and delimit the terms of the exemption." *See* Pet. App. at 51a. Moreover, even the case cited by the Second Circuit noted that "an agency's characterization of its own action is not conclusive," *APWU*, 707 F.2d at 559; yet as noted above, the Second Circuit relied on nothing else for its conclusion that the rule was interpretive and did not require notice and comment. The Second Circuit's reliance on the *APWU* case for this point is also inconsistent with

The Second Circuit likewise offered no sound authority for its conclusion that *Mead* deference is inappropriate when notice and comment rulemaking is undertaken voluntarily, citing only a law review article that described the question as "within an area of uncertainty." Pet. App. at 28a & n.6.[7] *Mead* distinguished agency interpretations that result from considered determinations based on formal procedures, and that are intended to have precedential effect, from *ad hoc* determinations using informal procedures. *See, e.g., PRMA,* 362 F.3d at 822 n.5 (distinguishing the 10,000 to 15,000 *ad hoc* decisions per year, from 49 different offices, at issue in *Mead* from a uniform policy adopted through statutory interpretation that was entitled to *Chevron* deference.) *Mead* does not suggest that the agency's use of formal procedures should be discounted merely because they are undertaken voluntarily.

The goal of the APA's notice and comment procedures is to "increase public participation and fairness in agency decisionmaking and to establish a mechanism by which an agency can improve its own information base." *National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992). That goal was met in this case when the agency, expressly charged by statute to define and delimit the scope of the domestic companionship exemption, increased public participation and im-

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later federal appellate precedent. *See, e.g., Pharmaceutical Research & Manufacturers of Am. v. Thompson*, ("*PRMA*"), 362 F.3d 817, 822 (D.C. Cir. 2004) ("Through this 'express delegation of specific interpretive authority,' *Mead*, 533 U.S. at 229, the Congress manifested its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law. The Secretary's interpretations of the Medicaid Act are therefore entitled to *Chevron* deference.")

[7] Indeed, the court cited, but chose not to follow, another law review article concluding that an agency's use of notice and comment rulemaking procedures should offer it a "safe harbor" entitlement to *Chevron* deference under *Mead*. *Id.*

proved its own information base through notice and comment rulemaking proceedings. The agency received substantial information as to the harms that would result if the exemption were applied to companionship services, and took this into account in its final rule. It reconfirmed its interpretation last year in a Memorandum intended to have binding effect and issued at a high level of the agency by the Deputy Administrator. Pet. App. at 50a-64a. The resulting rule is fully deserving of *Chevron* deference under *Mead*.

Finally, the Second Circuit's suggestion that the agency's notice and comment procedures here were "idiosyncratic" and "insufficient" because the agency changed its mind during rulemaking also ignores the realities of the rulemaking process. *See* Pet. App. at 5a, 27a. Public notice and comment procedures are undertaken so that the agency can take the information it gains into account in a meaningful way. The procedures would be empty exercises if an agency, having given fair notice of the issues it is considering, were to be precluded from changing its view on those issues after comment. The *Chevron* decision itself notes that a change in an agency's views does not deprive the agency's interpretation of deference: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 864. *See Rust v. Sullivan*, 500 U.S. at 186 ("This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question," *quoting Chevron*, 467 U.S. at 862). *See also Connecticut v. U.S. Department of Interior*, 228 F.3d 82, 93-94 (2d Cir. 2000)(rejecting argument that deference is not due an agency interpretation reversing a prior position.) This principle applies with even more force here, as the agency never adopted the proposed interpretation that would have removed third-party employers from the exemption.

In sum, the Second Circuit's analysis of the deference issue went seriously awry. It misapplied *Chevron* and *Mead*, and ignored the substantial deference the agency's rule is due even if *Chevron* were not applicable, given that it has been in place without change for thirty years, and has been left undisturbed seven times by Congress. *See Alaska Department of Environmental Conservation*, 540 U.S. at 492-93 (affirming agency interpretation of "longstanding duration" because it was a "rational interpretation" of the statute.) The requirement of substantial deference to long-standing agency interpretations would be rendered meaningless if courts could, as occurred here, reject agency interpretations fully consistent with the statutory language by substituting their own views.

Unless corrected by this Court, the Second Circuit's erroneous deference analysis will apply to all agency cases in that circuit, and retain the potential to confuse courts in other circuits as well. The Petition thus raises an important question with respect to judicial review of the administrative construction of statutes generally, as well as presenting a matter of great importance to the many parties that have relied on the specific agency rule that the Second Circuit improperly invalidated.

II. THE SECOND CIRCUIT'S DECISIONS WILL CAUSE A MASSIVE DISRUPTION TO THE PROVISION OF AFFORDABLE HOME CARE SERVICES IN NEW YORK STATE.

The Second Circuit's decisions are as harmful as they are erroneous. The agency issued 29 C.F.R. § 552.109(a) based on an extensive rulemaking record compiled in 1974 and 1975, *see* 40 Fed. Reg. 7404 (February 20, 1975), and reaffirmed it after taking extensive comments on a proposed amendment to the rule in 2001. *See* 67 Fed. Reg. 16,668 (April 8, 2002)(withdrawing proposed amendment). The rulemaking records contained substantial evidence of the

harms that would ensue if the statutory exemption were construed to exclude providers of companionship services employed by third parties, and the agency noted that including such employees in the exemption was fully consistent with the statutory language. *Id.*

The Second Circuit's decisions, by contrast, were made on the basis of virtually no record, and do not discuss or even acknowledge the adverse effects on providers and recipients of companionship services. Instead, the Second Circuit ruled on the basis of the pleadings alone, which as the District Court recognized, "provide little factual background." Pet. App. at 34a. A wide spectrum of governmental, nonprofit, and for-profit providers, including HCA, the City of New York and the New York State Association of Counties, the Home Care Council of New York City, Inc., the National Association for Home Care & Hospice, Inc., the New York State Association of Health Care Providers, Inc., and the Continuing Care Leadership Coalition have participated in this litigation to point out the numerous deleterious consequences of that decision.

The Second Circuit's rulings will decrease the availability of high quality home companionship services. As HCA's President averred to the Second Circuit, "the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State." Declaration of C. Rodat ¶ 3, Pet. App. at 104a.

As noted in HCA's declaration, HCA's provider members already face severely constrained budgets due to their reliance on government reimbursement, predominantly through Medicaid, which is calculated on historical rather than current health care costs, and due to overall decreases in government spending over the last decade. *Id.* ¶¶ 4-6, Pet. App. at 104a-

105a. Providers' inability to fund increased overtime will require them to staff cases on shorter shifts, using a limited pool of workers willing to work those shifts. This will likely lead to gaps in coverage and hurt continuity of care as patients must contend with increased turnover in caregivers. *Id.* ¶¶ 7-8, Pet. App. at 106a. Patients suffering from Alzheimer's Disease and other forms of dementia generally receive full time care, and benefit particularly from close interaction with familiar caregivers. Increased turnover among health care workers also increases the burden on skilled nurses required to supervise each worker serving a client, further taxing the resources of provider agencies.

HCA's President also averred that "[m]any patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services." *Id.* ¶ 8, Pet. App. at 103a. Such a result is directly contrary to Congress' intent in exempting companionship services from the minimum wage and overtime requirements of the Act. In *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 1110 (9th Cir. 1990), the Ninth Circuit was similarly "informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA."

Recent developments further increase the pressures created by the Second Circuit's decision. New York State has implemented a new criminal history check and fingerprinting requirements that adds new costs on providers and exacerbates the shortage of home care workers, as the process can take several weeks to complete. *See* 10 N.Y.C.R.R. § 400.23. These additional costs, which were raised substantially on September 1, 2006, are subject to reimbursement, but have so far been borne by providers, including HCA's members, who already face severe cost constraints due to their reliance on government reimbursement through Medicaid and Medicare. Funding levels for these reimbursements are outside HCA's

control, and increases are highly unlikely given federal and state budget deficits.[8] Federal law provided a zero percent inflation increase in Medicare payments for fiscal year 2006, and the Administration's proposed 2007 budget would freeze Medicare payments for another year.[9] Attrition will also increase as fewer home health care workers are given the opportunity to earn overtime. *See* C. Rodat Decl. ¶ 9, Pet. App. at 106a ("Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.")

The Second Circuit's rulings will also harm those recipients of home companion services, and their families, who need those services provided in their homes, but who are unable or unwilling to act as the direct employer of the service provider. *See* Letter from Sen. Christopher S. Bond to Mr. Thomas M. Markey, dated July 26, 2001 ("Many elderly do not care to be in this role, preferring the simplicity an reliability of using a third party who is in the business of supplying home care personnel. The reason for the proliferation of these companies is the simplicity and reliability of service provided by them."). Many individuals are not physically or mentally able to engage in all the activities required to employ individuals directly to provide companionship services, including finding caregivers, confirming their qualifications and suitability, arranging to pay their wages and benefits, handling the required tax and other regulatory paperwork, and making sure that shifts are covered when the companion is sick or otherwise unavailable. Yet, under the Second Circuit's ruling, if those persons use a third party

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[8] HCA has lobbied the State for increased funding to pay increased salaries for home care workers. See S. Greenhouse, *For Home Care Workers, A Fight for Pay, and Respect*, N.Y. Times, May 28, 2002, at B5.

[9] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5201, 120 Stat. 4, 46-47 (2006), amending 42 U.S.C. § 1395fff(b)(3)(B)(ii)(IV).

to handle these tasks they are now subject to dramatically increased costs through the application of federal wage and overtime laws. The agency has determined in the course of two extended rulemakings concerning 29 C.F.R. 552.109(a) that neither the statute nor sound policy requires such a result.

In sum, the Second Circuit's ruling will create a massive and wholly unnecessary disruption to the system through which New York has provided important home care services for decades. In reliance on the agency's long-standing exemption of home companionship services from the Act, whether or not those services are provided by third party employers, and on Congress' long-standing refusal to upset this rule, New York has developed an effective network through which social service agencies administer and supervise government-funded personal care programs, and under which Medicaid home care recipients are, with limited exceptions, receiving service from aides employed by home care providers licensed by the State of New York.[10] Because the DOL's rule is fully consistent with the statute and its legislative history, the appeals court's intervention to upset this system is gratuitous. By reviewing and overturning the Second Circuit's erroneous rulings invalidating the rule, this Court would prevent significant disruptions to this system.

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[10] *See* Michael S. Sparer, Medicaid and the Limits of State Health Reform 110-111 (1996)(describing New York City's efforts to channel government–funded home care services through third-party agencies).

CONCLUSION

Amicus respectfully submits that petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
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Petitioners,

v.

EVELYN COKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* HOME CARE COUNCIL OF NEW YORK CITY, INC. IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* HOME CARE COUNCIL OF NEW YORK CITY, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* Home Care Council of New York, Inc. in support of the Petition for a Writ of Certiorari filed by Petitioners Long Island Care at Home, Ltd. and Maryann Osborne. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, its counsel, and the affiliate of one of its

The Home Care Council of New York City, Inc. ("HCC") is the largest professional home care organization of any metropolitan city in the nation. Founded in 1983, HCC is a not-for-profit professional association of home health care providers, and currently includes among its members 64 proprietary and not-for-profit, community-based service providers operating in the five boroughs of New York City. Together, HCC members provide over $1 billion in home care services on an annual basis to more than 70,000 elderly, disabled and frail New York City residents.

Through contracts with the City of New York's Human Resources Administration, 51 of HCC's not-for-profit members provide personal care services to Medicaid-eligible New York City residents. HCC member agencies employ over 75,000 personal care aides, commonly referred to as home attendants. These workers, who are specially certified under New York State law, may not perform the medically-related activities that a home health aide is trained to perform, but provide often invaluable assistance with patients' activities of daily living and personal care, assistance that can mean the difference between living independently at home and moving into a nursing home for an elderly New Yorker.

HCC provides advocacy and educational opportunities for its members. Previously, HCC submitted an *amicus* brief to this Court in support of the Petition for a Writ of Certiorari to review the United States Court of Appeals for the Second Circuit's July 22, 2004 decision herein. In that decision, the Second Circuit declined to enforce the longstanding regulation that exempts home health care workers employed by third-party employers from federal wage and overtime pay requirements. On January 23, 2006, this Court granted the requested Writ of Certiorari, vacated the Court of Appeals'

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members, Visiting Nurse Service of New York, made a monetary contribution to the preparation or submission of this brief.

judgment, and remanded the case back to the Court of Appeals for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 ("DOL Memorandum") (December 1, 2005). 126 S. Ct. 1189, *on remand*, 462 F.3d 48 (2d Cir. 2006). In its memorandum, the agency reiterated its long-held position that the companionship exemption pursuant to 29 C.F.R. § 552.109(a) "applies to companions employed by third party employers." Cert. Pet. App. at 51a. Despite this guidance, the Second Circuit on remand adhered to its earlier decision.

HCC respectfully submits this brief in order to again present to the Court the unique perspective of its members—home health care providers to a Medicaid-eligible patient base operating under contract with a governmental agency. Resolution of the validity of the regulation is even more critical today than it was previously, as the grant of certiorari followed by the Second Circuit's endorsement of its earlier decision has tended to increase confusion among providers and encourage the filing of collective and class actions for back wages that will turn on the validity or invalidity of the regulation. The continued enforceability of the third-party employer regulation is of critical importance to HCC's members and to their ability to continue providing services to a patient population that is largely elderly, indigent, and totally dependent on these services.

SUMMARY OF ARGUMENT

By striking down a regulation that had been in effect for 30 years, the Second Circuit improperly substituted its judgment for that of the agency charged with implementing and administering the regulation. The Court of Appeals' failure to accord the proper level of deference to the administrative agency resulted in a ruling that is already having a profound effect on the provision of home health care services in New York City and, if not reversed, will negatively affect the

provision of essential services to the elderly, disrupt the continuum of care, and impair the collective bargaining agreements of New York City home health agencies with their labor unions, all without improving the financial circumstances of home health workers. Additionally, since the Court of Appeals' original July 22, 2004 decision, numerous lawsuits have been filed that will turn upon the continued validity of the regulation. This Court should again grant *certiorari* so that a definitive resolution of these issues can be achieved.

ARGUMENT

I. THE FAILURE OF THE SECOND CIRCUIT TO ACCORD APPROPRIATE DEFERENCE TO AGENCY RULEMAKING HAS JEOPARDIZED THE CONTINUED PROVISION OF VITAL HOME HEALTH SERVICES

A. Judicial Deference To Agency Expertise Has Its Basis In Sound Policy

In its memorandum and order granting the motion of Petitioners for judgment on the pleadings, the United States District Court reached the following conclusion with respect to the deference owed by the courts to the United States Department of Labor ("DOL"):

> The DOL's interpretation of Section 213(a)(15) [of the Fair Labor Standards Act ("FLSA")] in 1975 evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments [in 2002] shows that it still believes that these long-standing regulations are appropriate in the current home healthcare environment. Despite amending Section 213(a)(15) seven times since [1974], Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which

> is reasonable in light of the DOL's explicit Congressional mandate.

Coke v. Long Island Care at Home, Ltd., 267 F. Supp. 2d 332, 341 (E.D.N.Y. 2003), *aff'd in part, vacated in part*, 376 F.3d 118 (2d Cir. 2004), *vacated*, 126 S. Ct. 1189, *on remand*, 462 F.3d 48 (2d Cir.), *petition for cert. filed* (U.S. Oct. 26, 2006) (No. 06-593). As the District Court thus pointed out, DOL has on at least two occasions subjected the regulation at issue to intense scrutiny, once upon its promulgation and again more recently, when consideration was given to its possible amendment. Under the circumstances, deference to the agency's considered judgment would seem appropriate not only as a matter of sound application of administrative law principles, but also as a matter of public policy.

Amicus respectfully submits that in reversing the District Court's decision with respect to 29 C.F.R. § 552.109(a), and then adhering to that decision on remand after consideration of the DOL Memorandum, the Second Circuit improperly substituted its judgment for that of the administrative agency. Even while noting in its July 22, 2004 decision that an agency action that is "'"the fruit[] of notice-and-comment rulemaking or formal adjudication"'" should generally be accorded *Chevron* deference, and even while acknowledging that Section 552.109(a) was promulgated following notice and comment, the Court of Appeals declined to accord such deference, deeming the notice and comment procedure "substandard." 376 F.3d at 130-31 (citation omitted).

The fact remains, however, that it is just such notice and comment that provides an agency with the kind of information that must enter into the rulemaking process. As the District Court pointed out, when DOL withdrew the proposed amendments to Section 552.109(a) in April 2002, it did so because "'numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into

question the Department's conclusion that there would be little economic impact.'" 267 F. Supp. 2d at 338 (*quoting* 67 Fed. Reg. 16,668 (Apr. 8, 2002)). DOL terminated the proposal, thereby choosing to leave the regulation in the form first adopted in 1974 and abandoning the amendments, which had been proposed in the Federal Register on January 19, 2001. *See* 66 Fed. Reg. 5481 (Jan. 19, 2001). DOL made this determination in the exercise of its expertise and on the basis of the "rulemaking record as a whole." 67 Fed. Reg. 16,668. For the Second Circuit to strike this regulation down in a case that has not yet proceeded beyond the pleading stage not only flies in the face of established precedent, but also illustrates why judicial deference to agency expertise is appropriate.

Agencies have an expertise in their fields that judges and legislators do not necessarily possess, and are generally in the best position to determine how a proposed rule will affect the industry and the public. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). In *Chevron*, the respondents argued that the agency's interpretation was not entitled to deference because its latest interpretation represented a sharp break from its prior interpretations. This Court disagreed, noting that "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. DOL has done precisely that in the circumstances of this case. Nevertheless, its views have been rejected by the Second Circuit. Even in *Skidmore v. Swift*, 323 U.S. 134 (1944), where this Court declined to defer to the agency's interpretations, this Court recognized that an administrator's policies are based on expertise in the field. *Id.* at 139 ("But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"). In this particular instance, the Second Circuit could not know what the DOL learned

from the notice-and-comment proceedings, that is, the enormous impact that the invalidation of Section 552.109(a) would have on the home health care industry.

By its memorandum, which this Court specifically asked the Second Circuit to consider, the DOL provided ample response to the concerns raised by the Second Circuit, including the question whether the agency promulgated the regulation in the exercise of its delegated authority. The Department explained that it "promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its authority to issue regulations to implement all of the 1974 FLSA amendments." Cert. Pet. App. at 51a. The Department stated unequivocally that it "considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding." Cert. Pet. App. at 63a. As such, these regulations were not intended to be mere "advisory interpretations" as the Second Circuit suggested they were. Cert. Pet. App. at 63a. Rather, these regulations were intended to, and did, have the force of law for more than 30 years. Home health workers, their union representatives, and home health providers all assumed that the regulations were the law, and governed their affairs accordingly.

Nevertheless, contrary to the DOL's explicit assertion, the Court of Appeals most recently held that "§ 552.109(a) was not intended at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule." Cert. Pet. App. at 3a. The Court of Appeals concluded that it found "no reason to abandon the reasoning or the results reached in" its prior decision holding Section 552.109(a) to be unenforceable. Cert. Pet. App. at 6a. By adhering to its original decision, the Second Circuit continued to improperly substitute its own judgment for that of the administrative agency charged with implementing and administering the regulation in question. The impact of that decision is far-reaching, with

consequences that the Court of Appeals could not have anticipated.

B. The Second Circuit Decision Will Have A Severe Negative Impact On Home Health Care Services If Not Reversed

As the District Court herein pointed out in its analysis of Congressional intent:

> In regards to Section 552.109(a), the Court notes that the reasoning behind the companionship services exemption is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA.

267 F. Supp. 2d at 340. This reasoning holds especially true for the patients served by the members of HCC in New York City: where companionship services are being paid for from already stretched Medicaid budgets, continued exemption from the minimum wage and overtime provisions of the FLSA is essential, and clearly in accord with the Congressional intent to enable those who need home care services to obtain it.

Over the past decade, New York has cut Medicaid home care funding by an estimated $1 billion. Already the State and local administrators of the Medicaid program have had to cut back on home care services, often reducing the hours of service that the Medicaid program will cover. After the initial Second Circuit decision was issued in July 2004, the effort to reduce possible overtime liability led to further efforts to reduce service hours, and unless the Second Circuit decision is reversed, the outlook for continued service to the Medicaid-eligible patients cared for by HCC member agen-

cies is bleak indeed. The City has most recently estimated that the Second Circuit's decision will increase the cost of its personal care program by over $279 million annually. *See* Brief of Amici Curiae City of New York and New York State Association of Counties in Support of Petition for a Writ of Certiorari, dated December 5, 2006, at 6.

If the City cannot obtain the additional Medicaid funding needed to pay the provider agencies that comprise HCC's membership, they will face at best cash flow difficulties, and at worst, insolvency. Many HCC members are small community-based not-for-profit organizations that operate virtually at cost; such entities will not be able to survive while State and local governments seek additional funding for their programs. The providers can seek to minimize the impact of the Second Circuit decision by reducing overtime hours, but such efforts cannot cure the financial impact of the decision and could lead to other unfortunate effects.

While efforts can be made to cap hours to reduce overtime costs, reduction of covered hours can be devastating for patients and their families. More than half of Medicaid home care recipients in New York City have some degree of cognitive impairment, and thirty percent have moderate to severe cognitive impairment. Alene Hokenstad *et al.*, *Medicaid Home Care Services in New York City: Service Utilization & Family Involvement* 12 (United Hosp. Fund of N.Y. May 1998). Changing from a single familiar attendant on duty for twelve hours to multiple short shifts of attendants is a disruption of routine that can be disturbing for such patients. The reduction of covered hours is a cause of distress for home health care workers as well. Home health care workers generally prefer longer-hour cases. A twelve-hour shift enables the worker to develop the kind of relationship with a patient that best serves the needs and privacy concerns of the patient, and relieves the worker from shuttling across the city from patient to patient to make up a full day's work. Shorter shifts

also pose problems in other ways, as servicing a single patient with multiple workers may require an increased number of supervisory visits from registered nurses. With a recognized acute shortage of nurses, an increased need for nurses in one sector of the health care system affects availability in other sectors as well.

If home health care services must be reduced in the City, the effect will be far-reaching. Hospitals seeking to comply with pressure to discharge patients earlier will find that there is no home health care service to discharge the patient to; patients without family to fill the gap will find themselves in nursing homes where the cost to the Medicaid system is typically greater than the cost to maintain the same patient at home. Arguably, this last unintended effect of the *Coke* decision is inconsistent with New York's efforts to comply with this Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

If the companionship exemption is no longer available to third-party agencies, then the only employers who will be able to hire home health workers without being subject to FLSA requirements will be the patient and the family of the patient. Arranging for home health care for a patient involves: (1) finding a qualified home attendant, which includes checking qualifications and screening out applicants with criminal backgrounds; (2) hiring that person, which includes negotiating wages, arranging for workers' compensation and withholding of taxes; and (3) establishing schedules and coverage for situations when the chosen worker does not arrive as scheduled. These steps, in conjunction with the complexities of adherence to the requirements of government-funded programs, are burdens that most patients and their families simply cannot be expected to assume. Agencies such as HCC's members perform a vital function in the provision of home health care in New York City; without their expertise, the system would founder.

In short, unless the Second Circuit decision herein is reversed and the exemption restored, the sudden increase in costs to the home health system will pose grave difficulties to Medicaid-funded home health care and ultimately to other Medicaid-funded services as well. Longer stays in hospitals and increased admissions to nursing homes for Medicaid-eligible patients mean a funneling of patients to more expensive forms of care. Moreover, patients will suffer loss of their independence and the lot of home health workers will not be appreciably improved. Without money budgeted for overtime, employers will have to reduce shifts to avoid overtime. Collective bargaining agreements developed with the principal labor union based in New York State that represents home care workers, Local 1199, will have to be renegotiated, as these agreements do not assume applicability of FLSA requirements. Benefits previously granted in such agreements may have to be reconsidered.

C. The Importance Of These Issues Is Underscored By The Significant Number Of Pending Cases Involving The Regulation

The importance of the issues involved in this case is underscored by the significant number of cases pending before courts around the country that turn on the validity of the third-party employer regulations. Following the Second Circuit Court of Appeals decision of July 22, 2004, which refused to enforce 29 C.F.R. § 552.109(a), numerous new cases have been filed in district courts, in the form of class and collective actions, seeking to recover overtime pay for a variety of home health workers. More than twenty such cases have been brought in the Southern and Eastern Districts of New York alone.[2] In addition, the validity of the third-party

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[2] Counsel are aware of the following pending matters: *Vaicaitiene v. Partners in Care, Inc.*, No. 04-9125 (S.D.N.Y. filed Nov. 18, 2004); *Odinokova v. Association For Servs. For the Aged*, No. 05-02576

employer regulation was recently the subject of oral argument before the Eleventh Circuit.[3] Under the circumstances, the intervention of the Supreme Court is critical. *See Laing v. United States*, 423 U.S. 161, 167 (1976) (*certiorari* granted where 70 cases pending in the federal courts depended on resolution); *United States v. Powell*, 330 U.S. 238, 240 (1947) ("The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims against

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(S.D.N.Y. filed Mar. 4, 2005); *Batchoo v. Self-Help Cmty. Servs. Inc.*, No. 05-02645 (S.D.N.Y. filed Mar. 8, 2005); *Henry v. Alliance for Health Inc.*, No. 05-01264 (E.D.N.Y. filed Mar. 9, 2005); *Flores v. Bhrags Home Care Corp.*, No. 05-04621 (E.D.N.Y. filed Sept. 29, 2005); *Rempel v. Home Attendant Serv. of Hyde Park, Inc.*, No. 05-05561 (E.D.N.Y. filed Nov. 30, 2005); *Herrera v. Council for Hum. Servs. Home Care Servs. Corp.*, No. 05-10734 (S.D.N.Y. filed Dec. 22, 2005); *Sierra v. Special Touch Home Care Servs., Inc.*, No. 06-00333 (E.D.N.Y. filed Jan. 26, 2006); *Hatcher v. Concerned Home Mgrs. for the Elderly, Inc.*, No. 06-00705 (S.D.N.Y. filed Jan. 31, 2006); *Hamilton v. Unlimited Care, Inc.*, No. 06-00706 (S.D.N.Y. filed Jan. 31, 2006); *Greggs v. Utopia Home Care, Inc.*, No. 06-00469 (E.D.N.Y. filed Feb. 2, 2006); *Lyles v. Bestacare, Inc.*, No. 06-00583 (E.D.N.Y. filed Feb. 9, 2006); *Vente v. Tender Care Prof'l Servs., Inc.*, No. 06-00682 (E.D.N.Y. filed Feb. 16, 2006); *Toussaint v. Quality Health Care, Inc.*, No. 06-00886 (E.D.N.Y. filed Mar. 1, 2006); *Seymour v. Carelink*, Inc., No. 06-1293 (E.D.N.Y. filed Mar. 22, 2006); *Grandison v. Family Care Servs., Inc.*, No. 06-02795 (S.D.N.Y filed Apr. 11, 2006); *Grandison v. North Gen. Home Attendant Corp.*, No. 06-02971 (S.D.N.Y. filed Apr. 18, 2006); *Liverpool-Turner v. En-Care, Inc.*, No. 06-03002 (S.D.N.Y. filed April 19, 2006); *Lucas v. School Settlement Home Attendant Servs., Inc.*, No. 06-02410 (E.D.N.Y. filed May 18, 2006); *Jenkins v. Hanac Home Servs., Inc.*, No. 06-03592 (E.D.N.Y. filed July 21, 2006); *Pierce v. Progressive Home Health Servs. Inc.*, No. 06-13113 (S.D.N.Y. filed Nov. 13, 2006); *Harris v. Gentiva Health Servs., Inc.*, No. 06-06331 (E.D.N.Y. filed Nov. 28, 2006). Additional cases may have been brought in the Northern District of New York as well, including *Landerway v. Home Health Care & Companion Agency, Inc.*, No. 06-01451 (N.D.N.Y. filed Dec. 4, 2006).

[3] *Buckner v. Florida Habilitation Network, Inc.*, No. 06-11032-EE (argued Nov. 6, 2006).

the Government"); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 302 n.2 (1947) ("[W]e granted certiorari because of the novelty and importance of the principal question." The Court noted that the suit was "representative of a number already commenced"). These pending cases have affected scores of home health agencies and have the potential to impact hundreds, if not thousands, of home health employees, as agencies that relied upon a 30-year old regulation defend themselves against claims based on the regulation's invalidity. *See Paterson v. Lamb*, 329 U.S. 539, 541 (1947) ("This holding not only decided important questions concerning the power of the War Department, but also upset twenty-five years of important War Department rulings and practices which have affected, and will hereafter affect, the status and claims of thousands of draftees of the First World War. This called for our review, and we granted certiorari").

Because of the limited nature of the record before the Second Circuit when it rendered its decision reversing dismissal on the pleadings, and because it does not possess the expertise of the responsible agency, the Court of Appeals could not be aware of the far-reaching impact of its invalidation of 29 C.F.R. § 552.109(a). Under the circumstances, deference to the Department of Labor would have been the appropriate course. *Amicus curiae* Home Care Council of New York City respectfully requests that this Court grant *certiorari* to emphasize the dangers inherent in striking down a long-established regulation and to resolve the question of the enforceability of 29 C.F.R. § 552.109(a).

CONCLUSION

For all of the foregoing reasons, and those stated in the Petition, we respectfully request that this Honorable Court grant the Petition for a Writ of Certiorari.

Dated: New York, New York
December 15, 2006

Respectfully submitted,

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No. 06-593

IN THE
Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE

Petitioners

- v. -

EVELYN COKE

Respondent

On Petition for a Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

This statement is submitted pursuant to Rule 29.6.

National Association for Home Care & Hospice, Inc. ("NAHC") is a not-for-profit organization incorporated under the laws of the District of Columbia. NAHC states that it has no parent corporation and no publicly held corporation owns any of its stock.

INTEREST OF THE AMICUS CURIAE

The National Association for Home Care & Hospice, Inc. (NAHC) is a not for profit trade association representing the interests of nearly 6,000 home and community based health care providers throughout the nation. NAHC submits this proposed amicus[1] curiae brief in support of the Petition for Writ of Certiorari by Long Island Care at Home regarding the decision of the United States Court of Appeals for the Second Circuit in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006). [2]

NAHC has directly participated in legislative and regulatory matters involved in the companionship services exemption under the Wage & Hour law of the Fair Labor Standards Act that is at issue in this matter. NAHC members across the United States and the millions of individuals who receive their services face a risk of severe adverse impact through the Court of Appeals decision.

The Second Circuit's decision will pose a risk to the continued viability of home care services, raising costs for home care providers, increasing reimbursement obligations for government and private third-party payers, forcing undesired limits on the working hours of caregivers, and impeding access to the care settings of choice for millions of elderly and disabled citizens.

NAHC urges this Court to grant the Petition for Writ of Certiorari in order for this vital matter to receive

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[1] *Amicus* certifies that this brief was authored in whole by Counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person of entity made any monetary contribution to the preparation or submission of this brief.

[2] The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

the necessary review of significant legal and public policy concerns.

ARGUMENT

A. REVIEW BY THE U.S. SUPREME COURT IS WARRANTED AS THE QUESTIONS PRESENTED HAVE SIGNIFICANT NATIONAL IMPACT.

1. The Organization And Financing Of Home Care Services Will Be Adversely Impacted By The Decision Of The Court Of Appeals.

The Second Circuit ruling invalidated a 30 year old rule that had been the subject of two separate and extensive public rulemaking proceedings. In doing so, the Second Circuit, in a matter involving one employee and one employer, set in motion systemic changes to a health care delivery system that will cause serious impact on care recipients, caregivers, and the payers of services. Millions of this nation's elderly and disabled will be affected. Likewise public programs funding billions of dollars of home-based personal care services will face huge, unexpected cost increases.

Serious consideration must be given to the traumatic impact that the invalidation of 29 CFR §552.109(a) could have on care recipients, caregivers, and financing sources for that care. That impact cannot be understated.

Companionship services, otherwise known in health care as aide and personal care attendant service, are provided to millions of Medicare, Medicaid, TRICARE, and private pay recipients of care. They are young and old, permanently disabled and chronically ill. In 2000, the U.S. Department of Health and Human

Services reports that the number of individuals receiving home care services was 7,178,964.[3]

In 2002, Medicare expenditures for home health services provided to 2,724,000 beneficiaries totaled $9,635,000,000.[4] Medicaid expenditures for home care in 2000 reached $24.3 billion, of which $11.6 billion was spent on personal support services.[5]

The U.S. Department of Labor, Bureau of Labor Statistics, reports that 663,280 workers provide companionship services as home health aides and personal care aides.[6] Among the employers of these workers are 8,728 Medicare certified home health agencies throughout the country.[7]

On their own, these statistics demonstrate that the court's ruling can have unforeseen and unintended adverse consequences well beyond the individual petitioner and respondent. A review by this Court that will allow for the opportunity to consider these elements of the rulemaking process and others is well warranted.

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[3] *2000 National Home and Hospice Care Survey*, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, CD-ROM Series 13, No. 31 (July 2002).

[4] Centers for Medicare & Medicaid Services, Office of the Actuary, Medicare & Medicaid Cost Estimates Group, February 2004.

[5] Centers for Medicare & Medicaid Services, MSIS (formerly HCFA-2082) (www.cms.hhs.gov) September 2003.

[6] *Occupational Employment Statistics*, U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2005 (www.bls.gov/oes/current/oes311011.htm"nat) . Internet search 12/11/06.

[7] Centers for Medicare & Medicaid Services, Center for Information Systems, Health Standards and Quality Bureau, November 2006.

2. The Companionship Services Exemption Is A Unique Provision In The FLSA In That It Protects Consumers Of The Services Rather Than Employers Or Employees

The 1974 amendment to the Fair Labor Standards Act (FLSA) that established the "companionship services" exemption at issue in this matter is a unique action through which Congress offered protection to a class of consumers rather than employees. The central feature of the exemption is to provide a cost protection for the elderly and the infirm who require personal care and other support services, known as companionship services, to remain in their communities and in their own homes. When exploring the remedial nature of the FLSA, there must be a balance struck in favor of that intended protected class of consumers.

The Department of Labor regulations at issue recognize the agency's responsibility to implement that protection in a manner that does not discriminate based on the nature of the employer of the person providing companionship services. Establishing a distinction in the application of the exemption based on the nature of the employer puts at risk millions of current users of companionship services. That impact justifies review by this court.

From the time of the 1974 amendment through today, all branches of the federal government have recognized the importance of providing community based care to the elderly, infirm, and disabled. For example, in 1980, Congress enacted amendments to the Medicare program to eliminate coinsurance requirements under the home health benefit in order to remove any barriers

to care in the home that might lead to more costly and less humane institutional care. Section 930(h) of the "Medicare and Medicaid Amendments of 1980," P.L. 96-499, codified at 42 USC 1395l(b)(2).

More recently, with the enactment of the Americans with Disabilities Act of 1990, Congress ensured that individuals with disabilities be afforded the opportunity to receive public services and programs in the most integrated setting appropriate to their needs. 42 USC 12101*fff*. The right of disabled individuals to community-based care under the ADA and its implementing regulations was affirmed by this Court in *Olmstead v L.C.*, 527 US 581 (1999).

The Executive Branch of the United States government also has weighed in heavily in favor of home care. The "New Freedom Initiative" was announced by President Bush on February 1, 2001 followed by Executive Order 13217, Community-Based Alternatives for People with Disabilities(June 18, 2001).

The United States Department of Health and Human Service ("HHS"), which manages many of the public home care programs, set out its implementation of the Executive Order establishing civil rights compliance activities that facilitate community integration in "Delivering on the Promise, HHS' Report to the President on Executive Order 13217." www.hhs.gov/newfreedom/eo13217.html.) The HHS initiative is a nationwide effort to remove barriers to community living for people of all ages with disabilities and long term illness.

Any interpretation of the companionship services exemption under the FLSA that is at odds with the well established principle that the elderly and disabled should be afforded all reasonable opportunity to receive care in their own homes must be examined very carefully by this Court. With the Court of Appeals' ruling, recipients of

publicly and privately funded home care services will face barriers to access to that care when it is delivered by third party employers of home care aides and personal care attendants.

Requiring public programs to fund an overtime compensation obligation greatly increases the financial costs of such care, taxing limited state and federal funds. The alternative of changing those programs into cash-type funding to the recipients to directly employ caregivers sacrifices the benefits offered with existing programs where an employer manages caregiver recruitment, training, assignment, quality assurance, and payroll administration.

The Court of Appeals' ruling also results in discrimination against elderly and disabled individuals who are incapable of directly employing companionship services caregivers. If a public program initiates a cash-type home care program in response to the court's ruling, such individuals will find themselves incapable of participating.

Similarly, if an individual incapable of maintaining the role of an employer is privately purchasing care, access will be diminished because of the higher cost of care provided by third party employers.

The administrative role of an employer is a daunting task for anyone. With the various tax and other reporting responsibilities alone, it can become a bewildering responsibility. For disabled individuals, it may be an impossible responsibility. The ruling will impose a costly overtime compensation obligation for those elderly and disabled incapable of directly employing a caregiver. That is an obligation that would not exist for those with the physical capacities and mental wherewithal to directly employ the caregivers. Congress did not intend such discriminatory application of the companionship services exemption in the FLSA.

The public rulemaking process employed by the Department of Labor in the promulgation of the companionship service rule allowed all of the factors and consequences discussed above to be fairly considered. The ruling below discards all of that learning and results in an interpretation of the FLSA that can only cause harm to those the exemption intended to protect.

3. Third Party Payment Systems Are Poorly Equipped To React On A Timely Basis To Unexpected Cost Increases.

Medicare pays for home health services through a prospective payment system, 42 USC §1395fff; 42 CFR §484.200 (HHPPS). The HHPPS payment rate is adjusted annually through the application of a "market basket index," a sort of inflation factor. 42 USC §1395fff(b)(3)(B); 42 CFR §484.225.

However, the market basket index formula and the database utilized to apply that formula are not designed to address sudden cost changes without unreasonable delay. For example, the database utilized for the inflation factor for the calendar year 2005 proposed rates includes wages and salary data from 2000. 69 F.R. 31248 (June 2, 2004).

Compounding the problems with the Medicare market basket index update is the use of a wage index for geographic variation in payment rates. 42 USC §1395fff(b)(4)(A)(ii)i; 42 CFR §484.210(c).

However, changes in home care aide wages will not affect payment rates because the home health wage index is based upon hospital services wage data. As a result, providers of companionship services will

experience increased cost and unaffected Medicare payment rates.

Medicaid payment systems are even less predictable than the Medicare HHPPS. States participating in Medicaid are required to establish payment rates sufficient to enlist enough care providers to secure services at a level of access comparable to the non-Medicaid patient population. 42 USC §1396a(a)(30)(A); 42 CFR §447.204. Typically, state Medicaid programs adjust payment rates only after individuals have lost access to necessary care. See, *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993); *Orthopedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997).

In *Ball, et al v. Bledess, et al*, the District Court held that the Arizona Medicaid program home care payment rates violated 42 USC §1396a(a)(30)(A). CIV 00-0067-TUC-EHC (D. AZ. 8/13/2004). The court noted that despite multiple studies and reports since 1998 indicating the loss of access to care triggered by inadequate payment rates, the state did not respond.

Many of the Medicaid home care programs are designed around a standard of cost effectiveness. These programs, otherwise known as home and community-based care waivers, exist only to the extent that the cost of care is less than the cost of placement in an institutional setting. 42 USC §1396h(c) The increase in costs triggered by new overtime compensation obligations threatens the viability of these waiver programs and will block home and community-based care options for currently served individuals.

TRICARE, the health services program for over eight million military dependents and retirees will also be adversely impacted. Its basic home health services program is built on the Medicare payment model referenced above. 32 CFR Part 199. In addition, its

Extended Home Care Benefit is founded on cost-effectiveness principles comparable to the Medicaid waiver programs discussed herein. 69 F.R. 44942 (July 28, 2004).

B. REVIEW IS NEEDED TO RESOLVE THE SPLIT IN THE DECISIONS OF THE COURTS OF APPEALS.

Supreme Court review is essential when the Circuit Court of Appeals have issued rulings on federal law in direct conflict with each other. Here, the Second Circuit invalidated 29 CFR §552.109(a) based on its unwillingness to afford proper deference to the U.S. Department of Labor's rulemaking powers and the longstanding assent to DoL's rule by Congress. However, the Tenth Circuit has previously held that the same rule is valid and enforceable, granting deference to the federal agency's rulemaking actions. *Johnston v. Volunteers of America, Inc.*, 213 F. 3d 559,562 (10th Cir. 2000)

That conflict leads to nationwide confusion regarding the responsibilities of home care providers and the risk of wage related liabilities that they may face. Those uncertainties are not in the best interests of their patients and care recipients. Similarly, the uncertainties caused by the split in the court's impact of health care financing and planning by Congress, state legislatures, and third party payers across the nation. Supreme Court review of this matter is necessary

C. THE DECISION OF THE COURT OF APPEALS ERADICATES THE PURPOSE AND VALUE OF PUBLIC PARTICIPATION IN RULEMAKING.

The 2001 proposed rule that would have ended the application of the third party employment rule drew an

unusually diverse set of public comments that had obvious impact on the Department of Labor's ultimate withdrawal of the proposed rule.

On two occasions, Senator Christopher S. Bond (R-MO), Chairman of the Committee on Small Business of the United States Senate, wrote to the U.S. Department of Labor urging reconsideration of the proposed rule to modify the Companionship Services Exemption. In his July 26, 2001 letter, Chairman Bond indicated that the proposed redefinition of the Companionship Services Exemption and the elimination of its application to employees employed by a third party employer "directly contradicts the intent of Congress when it passed the amendments in 1974 which included this exemption." He further states that, "this proposal attempts to achieve through regulation what the previous administration was not able to achieve through legislation." Cert. Pet. App. at 120a-121a, *Long Island Care at Home v. Coke*, PETITION FOR A WRIT OF CERTIORARI, No. 04-1315.

Chairman Bond also took great issue with the department's finding that the regulation would have little impact on the economy, calling it "nonsensical." With particular focus on the proposal to eliminate the use of the exemption for third party employers, Chairman Bond expressed great concern for the consumers of the services stating that "these services are likely to be significantly more expensive than these elderly individuals can afford, thus requiring them to become the employer instead of contracting with a third party employer. Many elderly do not care to be in this role, preferring the simplicity and reliability of using a third party who is in the business of supplying home care personnel." Id.

These concerns are mirrored in other comments submitted by the Administration on Aging of the U.S. Department of Health and Human Services, the U.S. Small Business Administration and the Ohio Department

of Mental Retardation and Developmental Disabilities, and the National Association of State Directors of Developmental Disabilities Services

NAHC also participated in the rulemaking process on the companionship services exemption. This rulemaking afforded NAHC and others a crucial opportunity to voice interests and concerns regarding the proposed rule. However, with the Second Circuit's failure to provide any deference to the Secretary, the public comments are effectively disregarded.

The standard of deference that the Supreme Court has long applied in federal agency rulemaking serves not only to recognize the expertise and responsibilities of that agency; it also provides voice to those in the public who participated in the process. With the Second Circuit's uniquely composed analysis of deference, the public participation element of the rulemaking process is rendered meaningless. In the event that the decision is allowed to stand, the message to the public will be to test the validity of a proposed rule in court before investing in rulemaking participation. The Second Circuit's decision is a clear indication that the federal judiciary has a greater voice in rulemaking than does the public.

Here, the public participants in the rulemaking were broad-based and diverse, including a union representing employed companions, government payers of companion services, members of Congress, a government rule watchdog (SBA), and employers of companions. However, after multiple amendments to the Fair Labor Standards Act, and public rulemaking endeavors in 1975 and 2001, the Second Circuit found that no deference is due the Secretary's 30 year regulation. It is necessary for the Supreme Court to address the significant issues posed by an appellate decision that has the practical affect of rendering a transparent, public rulemaking process a

meaningless exercise for the federal agency and the participating commenters on the proposed rules.

CONCLUSION

NAHC urges this court to grant the Petition for Writ of Certiorari.

Dated: December 13, 2006, Washington, DC

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On Writ of Certiorari to the United States Court of Appeals
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No. 06-593

IN THE
SUPREME COURT OF THE UNITED STATES

LONG ISLAND CARE AT HOME, LTD. and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

The City of New York (the "City") and the New York State Association of Counties ("NYSAC") submit this brief in support of petitioners in this case. Both parties have consented to the filing of all amici briefs, in accordance with their general consent letters filed with this Court.[1]

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than amici curiae and their counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF THE AMICI CURIAE

The City and NYSAC have a significant interest in the validity of 29 C.F.R. 552.109(a) -- a longstanding United States Department of Labor regulation (hereinafter the "third-party employer regulation") that applied the "companionship services" exemption in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §213(a)(15), to employees engaged in providing companionship services and "employed by an employer or agency other than the family or household using their services."

The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home, if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

The City, the nation's largest municipality, oversees a Medicaid-funded program, which provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually, through the use of approximately 60,000 personal care aides, commonly referred to as home attendants. These personal care services are delivered through contracts with over 90 provider agencies throughout the City.

Pursuant to this Personal Care Services program, Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring,

walking and nutrition) when these services are medically needed to allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of care to be provided to Medicaid clients is the responsibility of the City's Human Resources Administration.

Medicaid clients may be authorized to receive personal care services for periods of time ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for more significantly impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

The City requires wages and benefits that support client services. Through its recently enacted Living Wage Law, NYC Admin. Code §6-109, the City requires that the providers pay the home attendants in the Personal Care Services program a minimum wage of $9.60/hr., a wage that exceeds the state's $7.15 minimum wage. Combining the $9.60 hourly minimum wage with differentials, such as those that are paid for longevity and care provided on the weekend, the average hourly wage is over $10.50/hr. The City also requires that provider agencies provide health benefits that cover immediate family, and a modest pension. There is currently no worker shortage for the City's Personal Care Services program, and approximately 90% of the service hours provided in that program are from home attendants who have been employed by the providers for at least 2100 hours. The vast majority of clients are

served by providers with labor agreements, whose home attendants are unionized.[2]

As a result of the third-party employer regulation, prior to the Second Circuit's decision declining to enforce that regulation, the home attendants were not subject to the wage and overtime requirements of the FLSA, and the annual cost to the Medicaid program of the City's Personal Care Services program was approximately $1.6 billion dollars. The program's cost is covered 50% by the federal government, 40% by the state, and 10% by the City. The City negotiates the hourly rates for each provider prospectively and then submits them to the state for approval. Commencing in January 2006, state legislation capped localities' Medicaid expenses, and the vast majority of any increases in costs over expenditures from 2005, including any costs of complying with the FLSA, will have to be borne by the state and federal governments. See 2005 N.Y. LAWS ch. 58 §1 Part C(1)(b)-(f).

Other than the above-discussed Medicaid-funded Personal Care Services program, which is overseen by the City, there are several other Medicaid-funded programs, which provide non-institutional long term care to the City's frail elderly and disabled citizens and are jointly administered by the City and the State of New York. Of these programs, the programs that service the largest number of clients in the City are the Long Term Home Health Care program and the Managed Long Term Care

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[2] The Living Wage Law provided that the minimum wage would increase to $10/hr. as of July 1, 2006. However, this was subject to the federal and state governments maintaining their combined aggregate proportionate share of funding and approved rates, see NYC Admin. Code §6-109(b)(2), and the wage has not yet increased to $10. An increase to $10, combined with the average differential pay, would result in an average wage of over $10.90/hr.

program. The combined current caseload of these two programs is approximately 28,000 clients. Like the Personal Care Services program, the weekly service hours for these alternative programs are based primarily on the client's clinical requirements, and the programs also use home attendants. The provider agencies subcontract with Licensed Home Care Service Agencies, which employ the home attendants, who typically serve several clients per week, providing up to 60 hours of service. The Licensed Home Care Service Agencies pass their costs to the authorized providers, which are reimbursed retroactively by the state on an allowable cost basis. Like the Personal Care Services program, these programs' costs are covered 50% by the federal government, 40% by the state, and 10% by the City, and the state legislation capping localities' Medicaid expenses also applies.

NYSAC is a not-for-profit municipal corporation incorporated pursuant to the laws of the State of New York. The sole membership of NYSAC consists of the 62 counties in New York State. NYSAC is the only statewide municipal association representing elected county executives, county supervisors, legislators, representatives, commissioners, and administrators from the 62 counties, including the 5 counties comprising the City. NYSAC's activities involve essential governmental functions, and all of its activities, including the filing of this amicus brief, accrue to the benefit of all county governments in the state. Outside the City, each of NYSAC's member counties provides Medicaid-funded personal care services in its respective jurisdiction throughout the state.

Affirmance of the Second Circuit's decision, which declined to enforce the third-party employer regulation, will have serious ramifications for the Medicaid-funded programs administered by the City and counties, in terms of both cost and the provision of care. Therefore, the

enforceability of the third-party employer regulation is of vital importance to the City and NYSAC.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision is erroneous and misapplied this Court's precedents regarding the amount of judicial deference to be accorded administrative determinations. The Second Circuit erred in holding that the third-party employer regulation did not qualify for *Chevron* deference. There is no dispute that Congress, in the companionship services exemption, expressly delegated authority to the Department of Labor to define and delimit the terms in the exemption. The third-party employer regulation was promulgated in the exercise of that authority, where: the third-party employer regulation expressly relies on the delegation of authority in the companionship services exemption; Part 552 of the regulations indicates that all of the regulations in that part were promulgated pursuant to the companionship services exemption and the Department of Labor's general authority pursuant to the FLSA to issue implementing regulations; and the third-party employer regulation was subject to the notice and comment procedures and goes beyond one case, binding all employees of third-party employers. Moreover, the Department of Labor has reaffirmed that the third-party employer regulation is a legislative rule and was not merely intended to be an advisory interpretation and that the Department considers the third-party employer regulation authoritative and legally binding. Given the above factors indicating that the regulation was promulgated by the Department of Labor in the exercise of its delegated authority, the fact that the regulation is in the subpart of Part 552 labeled "Interpretations" is irrelevant.

Applying *Chevron* deference, the third-party employer regulation should be upheld. As to Step 1 of *Chevron*, Congress did not speak directly to the issue of

whether employees employed by a third-party employer fell within the companionship services exemption, and delegated authority to the Department of Labor to define and delimit terms in the statute.

As to Step 2 of *Chevron*, the third-party employer regulation was based on a permissible construction of the statute, constituted a reasonable policy choice -- an issue more properly for legislators and administrators, not the courts -- and was not arbitrary, capricious, or manifestly contrary to the statute. The third-party employer regulation is consistent with the statutory language in the companionship services exemption and the FLSA amendments bringing domestic service employees within the coverage of the Act, where the statute does not make a distinction between employees who are employed by owners of the homes in which they are working and employees employed by third-parties.

Additionally, the third-party employer regulation is consistent with the statute's legislative history, which indicates that part of the reasoning behind the companionship services exemption was to allow those in need of such services to find assistance at a price they can afford and prevent them from unnecessarily being forced into long term care institutions. This concern applies whether the services are provided by direct hiring or through the use of an agency, such as in the Medicaid-funded programs overseen by the City and counties. The legislative history also indicates that the focus of the companionship services exemption was the nature of the employees' duties and the place where the activity was performed, not the identity of the employer.

Moreover, appropriately reading the regulations to give effect to all of the provisions, the regulations are internally consistent. In fact, construing the regulations as

the Second Circuit did, would render the regulations inconsistent with themselves.

The fact that the proposed regulation was different from the one that was ultimately promulgated is irrelevant. A proposed regulation does not represent an agency's considered interpretation of its statute, and an agency is entitled to consider alternative interpretations before settling on the view it considers most sound. Indeed, the whole idea behind the notice and comment procedure is to allow the agency to consider the proposed regulation in light of the public comments it receives. Here, the third-party employer regulation has been in force in its current form since it was promulgated over thirty years ago. Indeed, the fact that Congress has revisited the FLSA exemptions numerous times since 1974 without expressing any disapproval of the third-party employer regulation is further evidence that the third-party employer regulation is the interpretation of the companionship services exemption intended by Congress.

Finally, the complexity of the statutory regime and the expertise of the Department of Labor are further factors supporting the reasonableness of the third-party employer regulation. Thus, the third-party employer regulation should be upheld.

Affirming the Second Circuit's decision, which declined to enforce the third-party employer regulation, will have serious implications for the Medicaid-funded programs administered by the City and the counties. The Second Circuit's decision is expected to tremendously increase the annual cost of the programs, and it is unclear whether additional funding will be available to cover these cost increases. If the funding is not available, the government will have to assume the burden of implementing costly new program controls, such as limiting consumer access and capping service levels.

Providers subject to the new expenses of complying with the FLSA, without the incremental funding to meet these needs, may experience cash flow difficulties and even insolvency. While the costs arguably could be limited somewhat by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple home attendants providing care to a client without jeopardizing the client's welfare. In the worst cases, some clients, especially those with high hour needs, might no longer be able to be serviced in the community and might have to be institutionalized.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION IS ERRONEOUS AND MISAPPLIED THIS COURT'S PRECEDENTS REGARDING THE DEFERENCE TO BE ACCORDED ADMINISTRATIVE DETERMINATIONS.

A. The Second Circuit erred in holding that the third-party employer regulation did not qualify for *Chevron* deference.

The Second Circuit's decision that the third-party employer regulation did not qualify for *Chevron* deference is erroneous and misapplied this Court's precedents regarding the deference to be accorded administrative determinations.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court upheld a regulation of the Environmental Protection

Agency, on the ground that it was a permissible construction of the Clean Air Act. This Court explained that, if Congress has not directly spoken to the precise question at issue and has delegated to an agency to elucidate a specific statutory provision, the agency's regulation, which is then considered legislative, must be given controlling weight, unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 842-44.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court held that a tariff classification in a U.S. Customs Service ruling letter regarding day planners did not qualify for *Chevron* deference. This Court explained that the *Chevron* standard applies when the statute is ambiguous, Congress has delegated authority to the agency to make rules carrying the force of law, and the agency interpretation was promulgated in the exercise of that authority. *Id.* at 226-27, 229.

This Court, in holding that the *Chevron* standard was not applicable, found that there was no indication that Congress meant to delegate authority to Customs to issue ruling letters with the force of law and that there was no indication that Customs set out with a lawmaking pretense. This Court relied on the facts that the ruling letter: was not subject to a notice and comment procedure; did not go beyond the specific case under review and did not bind third parties; was subject to modification without notice, except to those persons to whom the letter was addressed; could be issued by any of 46 different Customs offices, which issued approximately 10,000 to 15,000 such letters per year; and did not have to be published. *Id.* at 223-24, 230-34.

In this case, pursuant to the above standards, the third-party employer regulation qualified for *Chevron* deference. There is no dispute that the companionship services exemption expressly delegated authority to the

Department of Labor to promulgate legislative rules, carrying the force of law, in that it gave the Department the authority to define and delimit the terms "companionship services" and "domestic service employment." *See* 29 U.S.C. §213(a)(15); *Coke*, 376 F.3d 118, 130-31 (2d Cir. 2004) (hereinafter "*Coke I*") & *Coke*, 462 F.3d 48, 50 (2d Cir. 2006) (hereinafter "*Coke II*").

Additionally, as explained by petitioners and the Department of Labor, the third-party employer regulation was promulgated in the exercise of that authority, where, inter alia: the third-party employer regulation expressly relies on the delegation of authority in the companionship services exemption; Part 552 of the regulations indicates that the companionship services exemption, as well as the Department of Labor's general authority to issue implementing regulations under the 1974 FLSA amendments that enacted that exemption (*Pub. L. No.* 93-259 §29[b], 88 Stat. 55, 76 [1974]), were the authority for all of the regulations in that part; and the Department of Labor, in its Advisory Memorandum, has reaffirmed that the third-party employer regulation is a legislative rule and was not merely intended to be an advisory interpretation, and that the Department considers the third-party employer regulation authoritative and legally binding. *See Dept. of Labor Wage and Hour Advisory Mem. No. 2005-1* at 7 (Dec. 1, 2005) (hereinafter "*2005 Wage and Hour Advisory Mem.*"). *See also Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Auer v. Robbins*, 519 U.S. 452, 461-3 (1997) (an agency's interpretation of its own ambiguous regulations is controlling, unless plainly erroneous or inconsistent with the regulation).

Further, unlike in *Mead*, the administrative determination at issue here is a regulation, not a letter ruling, and carries the force of law, in that it: is published; was subject to the notice and comment procedures; and goes beyond one case and binds all employees of third-

party employers. Thus, the Second Circuit misconstrued *Mead* in erroneously declining to accord the third-party employer regulation *Chevron* deference. *See also* Richard J. Pierce, *Admin. L. Treatise* §6.4 at 324-25 (4th ed. 2002) (explaining that legislative rules have binding effect, are required to be promulgated pursuant to notice and comment procedures, are within the scope of rulemaking authority conferred by Congress, and impose distinct obligations on members of the public).

While the Second Circuit based its decision that the third-party employer regulation was not intended to be a legislative rule primarily on the fact that that regulation is in Subpart B of Part 552, labeled "Interpretations," *Coke I*, 376 F.3d at 131-32; *Coke II*, 462 F.3d at 50-51, the Second Circuit is mistaken in supposing that a regulation labeled an "interpretation" can never be a regulation with the force of law subject to *Chevron* deference. "Many legislative rules 'interpret' statutory language, in the sense that they announce the agency's construction of a statute it has responsibility to administer." *Admin. L. Treatise* §6.4 at 326.

In fact, in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 386-90 (1999), this Court explicitly rejected the argument that the agency itself did not intend to issue a regulation subject to *Chevron* deference and only intended to bind agency employees, where the introduction to the regulation stated that the regulations that followed were "promulgated to inform the public of the constructions and *interpretations* that the United States Customs Service shall give to relevant statutory terms. . . ." (emphasis added). The introduction continued by stating that "nothing in these regulations purports or is intended to restrict the legal right of importers or others to a judicial review of the matters contained therein." This Court found that the above-cited language did not suffice to displace *Chevron* deference and emphasized that "[p]articularly in light of the fact that the

agency utilized the notice-and-comment rulemaking process before issuing the regulations, the argument that they were not intended to be entitled to judicial deference implies a sufficient departure from conventional contemporary administrative practice that we ought not to adopt it absent a different statutory structure and more express language to this effect in the regulations themselves." *Id.* at 390.

See also, Christensen v. Harris County, 529 U.S. 576, 586-88 (2000) (emphasizing that "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation"); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (noting that no *Chevron* deference was required to the interpretation of the Administrative Procedure Act by the Director of the Office of Workers' Compensation Programs, where, *inter alia*, that interpretation was not embodied in any regulation or similar binding policy pronouncement to which *Chevron* deference would apply); *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977) (a pre-*Chevron* case noting that courts are not required to give effect to interpretive regulations, but emphasizing that where Congress expressly delegated to an agency to prescribe standards or interpret statutory terms, the agency adopts regulations with legislative effect, which are entitled to review under the arbitrary and capricious standard); *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 416-22 (1942) (a pre-*Chevron* case explaining that the particular label placed upon the regulation was not necessarily conclusive, for it was the substance of what the agency purported to and did do which was decisive; holding that the particular regulations -- which were characterized as an announcement of policy, but which were adopted pursuant to the agency's rule-making power and applied to all licenses -- constituted an exercise of delegated legislative power).

The third-party employer regulation -- which was issued in reliance on express delegation, was subject to notice-and-comment procedures, was published in the Code of Federal Regulations, and binds all third-party employees -- is unlike interpretations of statutes contained in formats such as internal guidance memoranda, opinion letters, and briefs, which were not the product of formal rulemaking and to which *Chevron* deference has been declined. *See, e.g., Alaska Dep't of Envtl. Conservation v. Envtl. Protection Agency*, 540 U.S. 461, 487-88 (2004); *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136-37 n.9 (1997).[3]

In short, the Second Circuit erred in holding that the third-party employer regulation did not qualify for *Chevron* deference.[4]

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[3] *Chevron* deference was also denied to an Interpretive Rule of the United States Attorney General, issued without any formal procedure, on the ground that it was beyond the limited authority delegated by Congress. *Gonzalez v. Oregon*, 546 U.S. 243; 126 S.Ct. 904, 913-22 (2006). In this case, as previously mentioned, there is no dispute that there was an express delegation by Congress to the Department of Labor to promulgate legislative rules.

[4] Assuming, arguendo, that the third-party employer regulation did not qualify for *Chevron* deference, the arguments discussed *infra*, indicating that the third-party employer regulation was reasonable, would also warrant upholding the regulation pursuant to the more limited level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the agency's interpretative bulletin was entitled to some deference based on the agency's specialized experience and informed judgment; explaining that "the weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

B. The third-party employer regulation was based on a permissible construction of the statute and should be upheld as reasonable.

Applying *Chevron* deference, the regulation should be upheld as reasonable. Applying Step 1 of *Chevron*, Congress did not speak directly to the issue of whether employees employed by a third-party employer fell within the companionship services exemption. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967; 125 S. Ct. 2688, 2702 (2005). The statute is silent on the issue and delegates authority to the Department of Labor to define and delimit terms in the statute. *See* §213(a)(15). The statute does not contain definitions of the terms "companionship services" or "domestic service employment." *See* 29 U.S.C. §203, entitled "Definitions."

Applying Step 2 of *Chevron*, the third-party employer regulation was based on a permissible construction of the statute, constituted a reasonable policy choice, and was not arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843-45; *Nat'l Cable & Telecommunications Ass'n*, 125 S. Ct. at 2699, 2702. This Court has explained that *Chevron* deference is grounded in the separation of powers and that policy arguments are more properly addressed to legislators or administrators, not judges, who are not experts in the field and are not part of either political branch of the government. This Court has emphasized that, while agencies are not directly accountable to the people, the

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power to persuade, if lacking power to control"). *Accord Gonzalez v. Oregon*, 126 S. Ct. at 922.

Chief Executive is, and it is entirely appropriate for this political branch of the government to make difficult policy choices. This Court has further explained that when a challenge to an agency construction of a statutory provision really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, judges have a duty to respect the legitimate policy choices of those who do have constituencies. *Chevron*, 467 U.S. at 864-66; *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Am. Hosp. Ass'n v. Nat'l Labor Relations Bd.*, 499 U.S. 606, 620 (1991). The agency's interpretation need not be the best or most natural one, as long as it reasonable. *Pauley*, 501 U.S. at 702.

As explained by the Department of Labor, the third-party employer regulation is consistent with the statutory language in the companionship services exemption, which does not draw a distinction between companions who are employed by owners of the homes in which they are working and companions who are instead employed by third-party employers. *See* §213(a)(15); 40 *Fed. Reg.* 7404, 7405 (1975) (finding that the exemption could be available to third-party employers since they apply to "any employee" engaged in the enumerated services and that this interpretation was more consistent with the statutory language and prior practices concerning similarly worded exemptions); *2005 Wage and Hour Advisory Mem.* at 1-2 (explaining that the phrase "any employee" indicates that the exemption applies based on the activities of the employee, not the identity of the employer).

Likewise, the third-party employer regulation is consistent with the language in FLSA sections 206(f) and 207(l), which were added pursuant to the 1974 Amendments and do not draw a distinction between domestic service employees employed by individual homeowners and domestic service employees employed by

third-party employers. *See Pub. L. No.* 93-259 §7(b), 88 *Stat.* 55, 62 (1974). Rather, those sections apply the minimum wage and overtime provisions to domestic service employees as a whole. Section 206(f) directs that minimum wage be paid both to any employee in domestic service employed in "a household" or "one or more households." *See* §206(f)(1) & (2). The reference to "one or more households" would include those employees most likely to be employed by third-party employers. Additionally, section 207(l), entitled "Employment in domestic service in one or more households," provides that no employer shall employ any employee in domestic service in "one or more households" without paying overtime. That reference, too, would apply to employees employed by third-party employers. Thus, the third-party employer regulation is also consistent with sections 206(f) and 207(l), which do not distinguish between domestic service employees employed by owners of the homes in which they are working and those employed by third-party employers.

Additionally, the third-party employer regulation is consistent with the statute's legislative history, which indicates that part of the reasoning behind the FLSA companionship services exemption was to allow those in need of such services to find assistance at a price they could afford and prevent them from unnecessarily being forced into long term care institutions. *See* 118 *Cong. Rec.* 24715 (July 20, 1972) (statement of Sen. Taft) ("Many of us may not realize that much of the domestic service in this country . . . is directed toward taking care of older people, living in their own homes, who need additional help to have the proper nutrition. . . By adding to that cost today, we are going to increase tremendously the cost of taking care of our older people, perhaps force into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes."); 119 *Cong. Rec.* 24797, 24798, 24801 (July 19, 1973) (statements of Sens.

Dominick, Johnston and Burdick). *See also Dept. of Labor Wage and Hour Div Op. Let.* WH-368; 1975 WL 40991 (Nov. 25, 1975) (indicating that, in enacting the companionship services exemption, Congress was mindful of the special problems of working families who need a person to care for an elderly invalid at home). Indeed, the Second Circuit acknowledged that, among the FLSA's purposes, were a desire to ensure that companionship services remained affordable for working families. *Coke II*, 462 F.3d at 51.

As emphasized by the District Court and the Department of Labor, whether the services are provided by direct hiring or through the use of an agency, the objective is still the same: to allow the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA. *2005 Wage and Hour Advisory Mem.* at 2; *Coke*, 267 F. Supp.2d 332, 340 (E.D.N.Y. 2003). These concerns about cost certainly apply to the Medicaid-funded programs, overseen by the City and counties. As discussed in Pt. II *infra*, given the uncertainties and delays in Medicaid funding, complying with the FLSA may lead, in the worst cases, to the outcome that some clients, especially those with high-hour needs, might no longer be able to be serviced in their homes and might have to be institutionalized. *See also McCune v. Oregon Senior Svcs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) ("We are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA"); *Olmstead v. L.C.*, 527 U.S. 581, 597-602 (1999) (holding, in the context of the Americans with Disabilities Act, that undue institutionalization, which severely diminishes the everyday life activities of individuals, qualifies as discrimination by virtue of disability).

The legislative history also indicates that the focus of the companionship services exemption was the nature of the employees' duties and the place where the activity was performed, not the identity of the employer. *See 2005 Wage and Hour Advisory Mem.* at 2 (citing committee reports which focused on the nature of the employee's activities and the place where the activity was performed). *See also Dept. of Labor Wage and Hour Div. Op. Let.* WH-368; 1975 WL 40991 (Nov. 25, 1975) (explaining that a person employed in a private household to care for someone who cannot take care of himself or herself because of age or infirmity comes within the meaning of the companionship services exemption, whether such person is employed by the household or an agency, but that services performed outside a private home would not be within the term "domestic service").

The regulations are also internally consistent. Regulations should be read to give effect, if possible, to all the provisions. *See Jay v. Boyd*, 351 U.S. 345, 359-60 (1956). Harmonizing the regulations, sections 552.3 and 552.101 can be read as describing the kinds of work that constitute domestic service employment and establishing that such work must be performed in a private home, rather than in a place of business. Given that the third-party employer regulation explicitly addresses third-party employment and that the issue is not directly addressed by the other regulations, it appears that the other regulations were not intended to address the issue. *See 2005 Dept. of Labor Wage and Hour Advisory Mem.* at 4-5 (explaining that the references in §§552.3 and 552.101 to domestic service employment needing to be performed in the home of the employer were vestiges of the language's origin in the Social Security regulations; and citing the legislative history behind these regulations, which focused on the importance of the work being performed in a private home to qualify as "domestic service employment").

Further, as explained by the Department of Labor, construing sections 552.3 and 552.101(a) of the regulations as addressing the issue of third-party employment would render the regulations inconsistent with themselves. Aside from making §552.109(a) superfluous and contradictory, such a reading would be inconsistent with §552.101(a)'s inclusion of "private household workers" within the definition of "domestic service employment." As explained by the Department of Labor, the term "private household workers" has long been understood by both Congress and the Department to include the employees of third-party employers. *See* 119 *Cong. Rec.* 24796 (July 19, 1973) (statement of Sen. Dominick, quoting the Department's definition of the term "private household workers" as including employees working in a private residence and employed by a household service business); *2005 Wage and Hour Advisory Mem.* at 6 (discussing legislative history of term "private household workers").

While the Second Circuit relied on the fact that the Department of Labor's position has been inconsistent over time, in declining to give deference to the third-party employer regulation (*see Coke II*, 462 F.3d at 52; *Coke I*, 376 F.3d at 134), the fact that the proposed regulation was different from the one that was ultimately promulgated is irrelevant. "It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986) (rejecting the Court of Appeals' reasoning that deference was not due to the agency's interpretation of the statute because there was an inconsistency between the proposed rule and the final promulgated regulation). *See also Yellow Transp., Inc. v. Michigan*, 537 U.S. 36-39, 41, 45-48 (2002) (according *Chevron* deference to Interstate Commerce Commission regulations, which were issued pursuant to an

express delegation by Congress, after notice and comment proceedings, and differed from the regulations originally proposed). Indeed, the idea behind the notice and comment procedure is to allow the agency to consider the proposed regulation in light of the public comments it receives.

Moreover, even if the regulation had changed since it was promulgated, *Chevron* emphasized that an agency to engage in informed rule-making, must consider varying interpretations and the wisdom of its policy on a continuing basis. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 857-58, 863-64 (1984) (upholding the regulation as permissible, notwithstanding that the regulation was different than the one previously promulgated on the same subject). *See also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967; 125 S. Ct. 2688, 2699-2700 (2005) (rejecting the argument that the interpretation did not qualify for *Chevron* deference on the ground that the agency's interpretation was inconsistent with past practice; emphasizing that the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency).

In this case, the third-party employer regulation has been in force in its current form since it was promulgated over thirty years ago. Deference is especially warranted to longstanding administrative constructions, where Congress has revisited the statute and has not seen fit to revise or repeal the agency's interpretation. In those circumstances, there is persuasive evidence that the agency interpretation is the one intended by Congress. *Commodity Futures Trading Comm'n*, 478 U.S. at 845-46. *Accord Edelman v. Lynchburg College*, 535 U.S. 106, 117-18 (2002); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). In this case, as recognized by the Second Circuit, Congress revisited section 213 of the FLSA, by amending it seven times since 1974, without expressing

any disapproval of the third-party employer regulation. *See Coke I*, 376 F.3d at 130. Thus, the third-party employer regulation's long existence, without change by Congress, is a further factor supporting reasonableness of the regulation.

Finally, the complexity of the regulatory scheme, and the expertise of the Department of Labor are additional factors supporting the reasonableness of the third-party employer regulation. *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 217-22, 224-25 (2002) (explaining that *Chevron* was the appropriate standard, given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 125 S.Ct. 2688, 2712 (2005) (explaining that the agency was in a far better position than the Court to address the questions at issue, which involved a subject matter that was technical, complex, and dynamic); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

In short, the Second Circuit erred and misapplied this Court's precedents when it declined to accord *Chevron* deference to the Department of Labor's third-party employer regulation. In order to avoid repetition, the amici curiae adopt the other arguments made by petitioners in support of a reversal of the Second Circuit's decision.

II. AFFIRMING THE SECOND CIRCUIT'S DECISION WILL HAVE SERIOUS IMPLICATIONS FOR THE MEDICAID-FUNDED PROGRAMS ADMINISTERED BY THE CITY AND THE COUNTIES.

Affirming the Second Circuit's decision, which declined to enforce the third-party employer regulation, will have serious implications for the Medicaid-funded programs administered by the City and the counties in New York state, in terms of both cost and the provision of care.

A. Financial Implications for the Government of the Circuit's Decision

As to the City's Personal Care Services program alone, the Second Circuit's decision is estimated to increase the annual cost of the program and required Medicaid funding by approximately $250-280 million annually.

The estimated additional annual cost consists primarily of: (1) $73 million overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (2) an increase of $168 million in billable and overtime hours for 24 hour daily care provided by "sleep-in" home attendants, because non-paid "sleep-in" hours would be limited to 8 hours daily under the FLSA, see 29 C.F.R. 785.22, whereas under the City's current program, non-paid "sleep-in" hours consist of 12 hours daily, with a paid sleep-in shift differential; and (3) $14 million in travel time, which will now have to be paid to attendants who serve more than one client and travel between cases, see 29 C.F.R. 785.38.

Similarly, as to the other Medicaid-funded programs administered jointly by the City and State, or by the counties, while cost projections are not currently

available, compliance with the Second Circuit's decision will significantly increase the costs of these programs.

In short, the economic impact of complying with the Second Circuit's decision and continuing to provide services to clients currently receiving long term care services -- approximately 80,000 in the City alone -- is tremendous. The government will either have to pay for the increased costs of complying with the FLSA or assume the burden of implementing costly new program controls, such as limiting consumer access and capping service levels.

B. Implications for the Providers

It is unclear whether the additional funding to cover the increased costs will be available. There have been longstanding continuing concerns across government about Medicaid costs spiraling out of control. *See, e.g.*, 151 *Cong. Rec. S.* 14073, 14116-18 (Dec. 20, 2005); 152 *Cong. Rec. S.* 723, 723 (Feb. 6, 2006) (statements of Senator Grassley on Deficit Reduction Act of 2005, emphasizing that "three entitlement programs -- Social Security, Medicare, and Medicaid -- as a percentage of the gross domestic product are going to continue to grow and grow and grow until reaching a point where it squeezes out almost everything else in the Federal Budget" and that steps to reform Medicaid were based on a unanimous agreement of the 50 governors); *Nat'l Governors Ass'n, Policy Position "EC-16 Medicaid Reform Policy"* (July 20, 2005) ("Medicaid spending, however, has increased dramatically over the last five years driven by a 40 percent increase in caseload and a 4.5 percent per year increase in the health care price index, strengthening the impetus for reform"); *Administration's 1994 Health Budget: Hearing Before the Senate Finance Committee*, 103rd Cong. 1st Sess. 78 (Apr. 1, 1993) (prepared statement of Donna E. Shalala, HHS Secretary, indicating that the Medicaid reforms in the Omnibus

Budget Reconciliation Act of 1993, *Pub. L. No.* 103-66, 107 *Stat.* 312, were part of a package intended to confront "[t]he daunting task of cost containment" necessitated by rapidly increasing health care expenditures).

As to the City's Personal Care Services program, if the City's request to the State for increased rates is not approved and additional funding is not appropriated by the State in its budget, the providers will have no funding source to pay the additional costs to comply with the FLSA. Moreover, even if the funding is approved by the State, there likely would be a significant time lag from submission of the request to approval.

Many Personal Care Services program providers subject to the new expenses of complying with the FLSA, without the incremental funding to meet these needs, will experience cash flow difficulties. Many City providers are community based not-for-profit organizations that are funded at cost and operate with limited cash flow, without the backing of a parent organization with significant resources. Providers might find it necessary to increase their workforce to minimize each home attendant's hours in excess of 40 hours per week and, thereby, avoid overtime payment. Providers will then incur additional administrative costs associated with the hiring and maintenance of this increased workforce. In addition, providers will need to increase their nurse (RN) staffing levels in order to provide more supervisory visits on the cases as needed to ensure that each home attendant is assessed. Nurses are both hard to hire and costly. Also, more complex scheduling will result in the need for additional case coordinators. Further, some providers might need to ask the City to reduce their client caseload and might not be able to accept new cases, especially high-hour cases. Finally, some providers might find it difficult to meet payroll and become insolvent. Thus, the

implications for providers include cash-flow difficulties and potential insolvency.

C. Implications for Clients and Their Families

The above-discussed potential provider insolvency and efforts to reduce costs, such as limiting consumer access, capping service levels, and limiting each home attendant to 40 hours per week to avoid overtime, will have unfortunate impacts on individual clients. In the worst case, some clients, especially those with high-hour needs, might no longer be able to be serviced in the community and might have to be institutionalized.

Some clients with high-hour needs would be served by multiple home attendants. There are substantive reasons, however, why limiting each home attendant to 40 hours and providing multiple home attendants to clients is not readily doable. The relationship between a home attendant and client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below.

1. Privacy in the Home

Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for the

home attendant to build a trusting personal relationship with the client, as otherwise the attendant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

2. Continuity of Care

Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is comfortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable

about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

3. Family Compatibility

In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can be difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client. Further, if providers find it necessary to contain costs by introducing additional home attendants to the home, and if the client or client's family is unwilling to allow multiple attendants in the home, the ability to provide a safe plan of care may be compromised. In such circumstance, the final outcome may be that the client is transferred to a nursing home.

In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, limit the ability to provide multiple attendants for each client, in order to keep overtime costs down. Introducing multiple home attendants can create undue stress for clients and adversely impact their quality of life.

D. Implications for the Workforce

If home attendants are limited to working 40 hours per week to avoid overtime costs, many current longstanding home attendants who now work more than 40 hours weekly will see a reduction in their assigned hours and real wages. For example, a home attendant with the average hourly wage in the Personal Care Services Program, whose scheduled weekly hours are reduced from 50 to 40 weekly, will experience reduced annual earnings of about $5,460 or 20%. Home attendants facing such reduction in real wages might seek opportunities in other industries, putting the City's success in employee retention and client service at risk.

It is much simpler for home attendants to work for a single provider, rather than having to find employment with two or three different provider agencies so that their time with each provider does not exceed 40 hours per week.

In short, affirming the Second Circuit's decision will have serious implications in terms of both cost and the provision of care for the Medicaid-funded programs administered by the City and the counties in New York State.

CONCLUSION

THE SECOND CIRCUIT'S JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

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EVELYN COKE,

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BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 5, 2006

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BRIEF OF AMICI CURIAE CITY OF NEW YORK AND NEW YORK STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The City of New York (the "City") and the New York State Association of Counties ("NYSAC") submit this brief in support of the petition for a writ of certiorari in this case. Both parties have consented to the filing of this brief, and their consent letters are being filed herewith.[1]

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF THE AMICI CURIAE

The City and NYSAC have a significant interest in having this Court grant the petition and determine the validity of 29 C.F.R. 552.109(a) -- a longstanding United States Department of Labor regulation (hereinafter the "third-party employer regulation") that applied the "companionship services" exemption in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §213(a)(15), to employees engaged in providing companionship services and "employed by an employer or agency other than the family or household using their services."

The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

The City, the nation's largest municipality, oversees a Medicaid-funded program, which provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually, through the use of approximately 60,000 personal care aides, commonly referred to as home attendants. These personal care services are delivered through contracts with over 90 provider agencies throughout the City.

Pursuant to this Personal Care Services program, Medicaid-eligible individuals can obtain assistance with

activities of daily living (bathing, toileting, transferring, walking and nutrition) when these services are medically needed to allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of care to be provided to Medicaid clients is the responsibility of the City's Human Resources Administration.

Medicaid clients may be authorized to receive personal care services for periods of time ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for more significantly impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

As a result of the third-party employer regulation, prior to the Second Circuit's decision declining to enforce that regulation, the home attendants were not subject to the wage and overtime requirements of the FLSA, and the annual cost to the Medicaid program of the City's Personal Care Services program was approximately $1.6 billion dollars. The program's cost is covered 50% by the federal government, 40% by the state, and 10% by the City. The City negotiates the hourly rates for each provider prospectively and then submits them to the state for approval. Commencing in January 2006, state legislation capped localities' Medicaid expenses, and the vast majority of any increases in costs over expenditures from 2005, including any costs of complying with the FLSA, will have to be borne by the state and federal governments. See 2005 N.Y. LAWS ch. 58 §1 Part C(1)(b)-(f).

Other than the above-discussed Medicaid-funded Personal Care Services program, which is overseen by the City, there are several other Medicaid-funded programs, which provide non-institutional long term care to the City's frail elderly and disabled citizens and are jointly administered by the City and the State of New York. Of these programs, the programs that service the largest number of clients in the City are the Long Term Home Health Care program and the Managed Long Term Care program. The combined current caseload of these two programs is approximately 28,000 clients. Like the Personal Care Services program, the weekly service hours for these alternative programs are based primarily on the client's clinical requirements, and the programs also use home attendants. The provider agencies subcontract with Licensed Home Care Service Agencies, which employ the home attendants, who typically serve several clients per week, providing up to 60 hours of service. The Licensed Home Care Service Agencies pass their costs to the authorized providers, which are reimbursed retroactively by the state on an allowable cost basis. Like the Personal Care Services program, these programs' costs are covered 50% by the federal government, 40% by the state, and 10% by the City, and the state legislation capping localities' Medicaid expenses also applies.

NYSAC is a not-for-profit municipal corporation incorporated pursuant to the laws of the State of New York. The sole membership of NYSAC consists of the 62 counties in New York State. NYSAC is the only statewide municipal association representing elected county executives, county supervisors, legislators, representatives, commissioners, and administrators from the 62 counties, including the 5 counties comprising the City. NYSAC's activities involve essential governmental functions, and all of its activities, including the filing of this amicus brief, accrue to the benefit of all county governments in the state. Outside the City, each of NYSAC's member counties

provides Medicaid-funded personal care services in its respective jurisdiction throughout the state.

The Second Circuit's decision declining to enforce the third-party employer regulation will have serious ramifications for the Medicaid-funded programs, in terms of both cost and the provision of care, for everyone involved in the program, including the government, the providers of service, the home attendants, and individuals receiving services. Therefore, the enforceability of the third-party employer regulation is of vital importance to the City and NYSAC.

SUMMARY OF THE ARGUMENT

The petition should be granted for three reasons. First, the enforceability of the third-party employer regulation is of profound importance, because it has serious implications for the above-discussed Medicaid-funded programs, such as those administered by the City and the counties. The Second Circuit's decision is expected to tremendously increase the annual cost of the programs, and it is unclear whether additional funding will be available to cover these cost increases. While the costs arguably could be limited somewhat by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple home attendants providing care to a client without jeopardizing the client's welfare.

Second, there is a direct conflict in the Circuits as to the degree of deference to be accorded the third-party employer regulation, with the result that the Tenth Circuit has upheld the regulation, while the Second Circuit declined to enforce the regulation. The Second Circuit's decision also conflicts with the Advisory Memorandum of

the Department of Labor, which indicated that the Department will continue to apply the third-party employer regulation in states outside the Second Circuit. Third, the Second Circuit's decision is erroneous and misapplied this Court's precedents regarding the amount of judicial deference to be accorded administrative determinations.

This case merits this Court's guidance and the exercise of this Court's supervisory powers.

REASONS FOR GRANTING THE PETITION

I. THE ENFORCEABILITY OF THE THIRD-PARTY EMPLOYER REGULATION IS OF GREAT IMPORTANCE.

The Second Circuit's decision, declining to enforce the third-party employer regulation, is of profound importance, in that it has serious implications for the above-discussed Medicaid-funded programs administered by the City and the counties in New York state, in terms of both cost and the provision of care.

A. Financial Implications for the Government of the Circuit's Decision

As to the City's Personal Care Services program alone, the Second Circuit's decision is estimated to increase the annual cost of the program and required Medicaid funding by over $279 million annually. The City's Medicaid funding will need to increase from $1.592 billion to about $1.871 billion annually in order to sustain its current client service levels.

The estimated additional $279 million annual cost consists primarily of: (1) $103 million overtime pay at time and one-half for home attendants who work in excess of 40

hours weekly; (2) an increase of $160.9 million in billable and overtime hours for 24 hour daily care provided by "sleep-in" home attendants, because non-paid "sleep-in" hours would be limited to 8 hours daily under the FLSA, see 20 C.F.R. 785.22, whereas under the City's current program, non-paid "sleep-in" hours consist of 12 hours daily, with a paid sleep-in shift differential; and (3) $13.3 million in travel time, which will now have to be paid to attendants who serve more than one client and travel between cases, see 29 C.F.R. 785.38.

Similarly, as to the other Medicaid-funded programs administered jointly by the City and State, or by the counties, while cost projections are not currently available, compliance with the Second Circuit's decision will significantly increase the costs of these programs.

In short, the economic impact of complying with the Second Circuit's decision and continuing to provide services to clients currently receiving long term care services -- approximately 80,000 in the City alone -- is tremendous. The government will either have to pay for the increased costs of complying with the FLSA or assume the burden of implementing costly new program controls, such as limiting consumer access and capping service levels.

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As to the City's Personal Care Services program, it is unclear whether the additional funding to cover the increased costs will be available. If the City's request to the State for increased rates is not approved and additional funding is not appropriated by the State in its budget, the providers will have no funding source to pay the additional costs to comply with the FLSA. Moreover, even if the funding is approved by the State, there likely would be a

significant time lag from submission of the request to approval.

Many Personal Care Services program providers subject to the new expenses of complying with the FLSA, without the incremental funding to meet these needs, will experience cash flow difficulties. The majority of providers are community based not-for-profit organizations that are funded at cost and operate with limited cash flow, without the backing of a parent organization with significant resources. Providers might find its necessary to increase their workforce to minimize each home attendant's hours in excess of 40 hours per week and, thereby, avoid overtime payment. Providers will then incur additional administrative costs associated with the hiring and maintenance of this increased workforce. Additionally, some providers might need to ask the City to reduce their client caseload and might not be able to accept new cases, especially high-hour cases. Further, some providers might find it difficult to meet payroll and become insolvent. Thus, the implications for providers include cash flow difficulties and potential insolvency.

C. Implications for Clients and Their Families

The above-discussed potential provider insolvency and efforts to reduce costs, such as limiting consumer access, capping service levels, and limiting each home attendant to 40 hours per week to avoid overtime, will have unfortunate impacts on individual clients. In the worst case, some clients, especially those with high-hour needs, might no longer be able to be serviced in the community and might have to be institutionalized.

Some clients with high-hour needs would be served by multiple home attendants. There are substantive reasons, however, why limiting each home attendant to 40

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1. Privacy in the Home

Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for the home attendant to build a trusting personal relationship with the client, as otherwise the attendant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the

person with whom the client is comfortable returns from leave.

2. Continuity of Care

Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is comfortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

3. Family Compatibility

In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can be difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home

attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client. Further, if providers find it necessary to contain costs by introducing additional home attendants to the home, and if the client or client's family is unwilling to allow multiple attendants in the home, the ability to provide a safe plan of care may be compromised. In such circumstance, the final outcome may be that the client is transferred to a nursing home.

In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, limit the ability to provide multiple attendants for each client, in order to keep costs down. Introducing multiple home attendants can create undue stress for clients and adversely impact their quality of life.

D. Implications for the Workforce

If home attendants are limited to working 40 hours per week, many current longstanding home attendants who now work more than 40 hours weekly might seek opportunities in other industries, further putting client service at risk. It is much simpler for home attendants to work for a single provider, rather than having to find employment with two or three different provider agencies so that their time with each provider does not exceed 40 hours per week.

In short, this Court should review the Second Circuit's decision, given the serious implications in terms of both cost and the provision of care for the Medicaid-funded programs administered by the City and the counties in New York State.

II. THERE IS A DIRECT CONFLICT IN THE CIRCUITS AS TO THE DEGREE OF DEFERENCE TO BE ACCORDED THE THIRD-PARTY EMPLOYER REGULATION.

The Second Circuit's decision as to the degree of deference to be accorded the third-party employer regulation conflicts directly with that of the Tenth Circuit in *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001). In *Johnston*, the Tenth Circuit accorded the third-party employer regulation deference pursuant to this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and upheld the regulation. *See Johnston*, 213 F.3d at 561-62. In this case, by contrast, the Second Circuit declined to accord the third-party employer regulation *Chevron* deference, applied the less-deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and declined to enforce the regulation. *See Coke*, Pet App. at 1a-6a (*Coke II* decision after remand, adhering to the reasoning and results in *Coke I*), 23a-32a (*Coke I decision*).

While the Second Circuit attempted to distinguish *Johnston* on the ground that it pre-dated this Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001) (*see* Pet. App. at 25a, *Coke I*), as explained by this Court in *Mead*, "*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form," or "to eliminate *Skidmore's* recognition of various justifications for deference depending on statutory circumstances and agency action." *Mead*, 533 U.S. at 234, 236-38.

Indeed, in cases following *Chevron* but pre-dating the Tenth Circuit's decision in *Johnston*, this Court applied the less-deferential *Skidmore* standard, in reviewing certain administrative determinations. *See, e.g., Christensen v.*

Harris County, 529 U.S. 576, 586-87 (2000) (applying the less-deferential *Skidmore* standard in reviewing a Department of Labor opinion letter).

Thus, the fact that the Tenth Circuit's decision in *Johnston* pre-dated this Court's decision in *Mead* does not in any way minimize the direct conflict between the Circuits.[2]

In addition to conflicting with the decision of the Tenth Circuit, the Second Circuit's decision conflicts with the December 1, 2005 Advisory Memorandum of the Department of Labor. The Advisory Memorandum rejected the *Coke* analysis and instructed Regional Administrators and District Directors to continue to apply the third-party employer regulation in states outside the Second Circuit. *See* Pet. App. at 50a-64a.

III. THE SECOND CIRCUIT'S DECISION IS ERRONEOUS AND MISAPPLIED THIS COURT'S PRECEDENTS REGARDING THE DEFERENCE TO BE ACCORDED ADMINISTRATIVE DETERMINATIONS.

The Second Circuit's decision is erroneous and misapplied this Court's precedents regarding the deference to be accorded administrative determinations.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court

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[2] In fact, a post-*Mead* Tenth Circuit case has continued to follow the holding in *Johnston*. *See Welding v. Bios Corp.*, 353 F.3d 1214, 1217 & n.3 (10th Cir. 2004) (noting *Johnston* and that the FLSA companionship services exemption can apply even when the domestic service employee is employed by a service agency, such as the defendant corporate provider in that case).

upheld a regulation of the Environmental Protection Agency, on the ground that it was a permissible construction of the Clean Air Act. This Court explained that, if Congress has not directly spoken to the precise question at issue and has delegated to an agency to elucidate a specific statutory provision, the agency's regulation, which is then considered legislative, must be given controlling weight, unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 842-44. This Court noted that the fact that the agency has from time to time changed its interpretation does not mean that the agency's interpretation is not entitled to deference. This Court emphasized that an agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. *Id.* at 863-64. Additionally, this Court noted that an agency to which Congress has delegated policymaking responsibilities may, within the limits of its delegation, properly rely on the incumbent administration's view of wise policy to inform its judgments. *Id.* at 865-66.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court held that a tariff classification in a U.S. Customs Service ruling letter regarding day planners was not entitled to *Chevron* deference. This Court explained that *Chevron* deference applies when the statute is ambiguous, Congress has delegated authority to the agency to make rules carrying the force of law, and the agency interpretation was promulgated in the exercise of that authority. *Id.* at 226-27, 229.

This Court, in holding that *Chevron* deference did not apply, relied on the facts that there was no indication that Congress meant to delegate authority to Customs to issue ruling letters with the force of law and that the ruling letter: was not subject to a notice and comment procedure; did not go beyond the specific case under review and did not bind third parties; was subject to modification without

notice, except to those persons to whom the letter was addressed; could be issued by any of 46 different Customs offices, which issued approximately 10,000 to 15,000 such letters per year; and did not have to be published. *Id.* at 223-24, 230-34.

In this case, pursuant to the above standards, the third-party employer regulation was entitled to *Chevron* deference. There is no dispute that the companionship services exemption expressly delegated authority to the Department of Labor to define and delimit the terms "companionship services" and "domestic service employment." *See* 29 U.S.C. §213(a)(15); *Coke I & II*, Pet. App. at 2a-3a, 23a-24a, 26a. Additionally, as explained by petitioners and the Department of Labor, the third-party employer regulation was promulgated in the exercise of that authority, where, inter alia: the third-party employer regulation expressly relies on the delegation of authority in the companionship services exemption; Part 552 of the regulations indicates that the companionship services exemption was the authority for all of the regulations in that part; and the Department of Labor, in its Advisory Memorandum, has reaffirmed that the third-party employer regulation is a legislative rule and was not merely intended to be an advisory interpretation and that the Department considers the third-party employer regulation authoritative and legally binding. *See* Pet. at 16-23; 51a, 63a-64a.

Unlike in *Mead*, the administrative determination at issue here is a regulation, not a letter ruling, and carries the force of law, in that it: is published and was subject to the notice and comment procedures; goes beyond one case and binds all employees of third-party employers; and has been in force for more than thirty years without change, notwithstanding that Congress has on numerous occasions amended 29 U.S.C. §213, which contains the companionship services exemption. Thus, the Second Circuit misconstrued *Mead* in erroneously declining to

accord the third-party employer regulation *Chevron* deference. *See also* Richard J. Pierce, *Admin. L. Treatise* §6.4 at 324-25 (4th ed. 2002) (explaining that legislative rules have binding effect, are required to be promulgated pursuant to notice and comment procedures, are within the scope of rulemaking authority conferred by Congress, and impose distinct obligations on members of the public).

Indeed, further supporting the proposition that the Second Circuit misapplied this Court's decision in *Mead* is the fact that, following *Mead*, this Court does not appear to have declined *Chevron* deference to any similar regulation. *See, e.g., Washington State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382, 390 (2003) (holding that *Chevron* deference was owed to the regulations of the Commissioner of Social Security); *Barnhart v. Walton*, 535 U.S. 212, 217-22, 224-25 (2002) (same and explaining that *Chevron* was the appropriate standard, given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 41, 45-48 (2002) (according *Chevron* deference to Interstate Commerce Commission regulations, which were issued pursuant to an express delegation by Congress, after notice and comment proceedings, and differed from the regulation originally proposed). *See also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967; 125 S. Ct. 2688, 2697-2700 (2005) (according *Chevron* deference to the Federal Communications Commission's interpretation of a term in a Declaratory Ruling, issued pursuant to rulemaking procedures, and emphasizing that agency inconsistency is not a basis for declining to analyze the agency's interpretation under *Chevron*, as the whole point of *Chevron* is to leave the

discretion provided by the ambiguities of a statute with the implementing agency).

Chevron deference appears to have been declined only to internal guidance memoranda and interpretations contained in publicly available operating instructions for processing social security claims, which were not the product of formal rulemaking. *See Alaska Dep't of Envtl. Conservation v. Envtl. Protection Agency*, 540 U.S. 461, 487-88 (2004); *Washington State Dep't of Social and Health Servs.*, 537 U.S. 371, 385-86 (2003). Additionally, *Chevron* deference was also denied to an Interpretive Rule of the United States Attorney General, issued without any formal procedure, on the ground that it was beyond the limited authority delegated by Congress. *Gonzalez v. Oregon*, _ U.S. _, 126 S.Ct. 904, 913-22 (2006). In this case, as previously mentioned, there is no dispute that there was an express delegation by Congress to the Department of Labor to promulgate legislative rules.

This post-*Mead* treatment of such regulations is consistent with other pre-*Mead* cases. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000) (emphasizing that "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation"); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (noting that no deference was required to the interpretation of the Administrative Procedure Act by the Director of the Office of Workers' Compensation Programs, where, *inter alia*, that interpretation was not embodied in any regulation or similar binding policy pronouncement to which *Chevron* deference would apply); *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977) (a pre-*Chevron* case noting that courts are not required to give effect to interpretive regulations, but emphasizing that where Congress expressly delegated to an agency to prescribe standards or interpret statutory terms, the agency adopts regulations with

legislative effect, which are entitled to review under the arbitrary and capricious standard).

In short, the Second Circuit erred and misapplied this Court's precedents when it declined to accord *Chevron* deference to the Department of Labor's third-party employer regulation. The third-party employer regulation is reasonable, especially where, as noted by the District Court and explained by the Department of Labor, part of the reasoning behind the FLSA companionship services exemption is to allow those in need of such services to find assistance at a price they can afford and prevent them from unnecessarily being forced into long-term care institutions. As emphasized by the District Court and the Department of Labor, whether the services are provided by direct hiring or through the use of an agency, the objective is still the same: to allow the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA. *See* Pet. App. at 46a-47a, 52a.

In order to avoid repetition, the amici curiae adopt the other arguments made by petitioners in support of a grant of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF NEW YORK STATE ASSOCIATION OF HEALTH CARE PROVIDERS, INC. IN SUPPORT OF PETITIONERS

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PRELIMINARY STATEMENT

The New York State Association of Health Care Providers, Inc. submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Both parties have consented to the filing of this brief, and their consent letters are being filed herewith.[1]

INTEREST OF THE *AMICUS CURIAE*

The New York State Association of Health Care Providers, Inc. ("HCP") is a not-for-profit industry association of home and community-based health care providers throughout the State of New York. HCP represents approximately 500 offices of licensed home care service agencies, certified home health agencies, long term home health care programs, hospices and related health care organizations. HCP seeks to foster the interests of the health care industry and the public it serves by developing and supporting programs and policies that promote the highest quality of health care for the residents of New York State.

HCP member agencies employ individuals to provide companionship services in virtually every part of the State of New York. As a result, HCP and its members have a critical interest in the validity of 29 C.F.R. § 552.109(a), a regulation promulgated by the U.S. Department of Labor (the "Department" or "DOL") in 1975 to exempt companionship workers who are employed by third parties from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA"). For

1. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* HCP, its members and its counsel, made a monetary contribution to the preparation and submission of this brief.

more than 30 years, that regulation has relieved home care provider agencies — and, therefore, the elderly and infirm individuals they serve, who are overwhelmingly medically indigent — of the burdensome cost of complying with the FLSA's minimum wage and overtime requirements. The Department's regulation is predicated upon the Congressional interest in ensuring that companionship services can be afforded by those who require them.

In this case, however, the U. S. Court of Appeals for the Second Circuit has twice declined to enforce the third party employer exemption. *See Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 376 F.3d 118 (2d Cir. 2004) ("*Coke I*") and *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2d Cir. 2006) ("*Coke II*").

HCP offers this brief *amicus curiae* in support of the request of petitioners Long Island Care at Home, Ltd. and Maryann Osborne ("Petitioners") for a writ of certiorari. As the representative of home care agencies throughout New York State, HCP has unique, industry-wide access to information that demonstrates that the decisions of the Second Circuit to invalidate the third-party employer exemption contained in 29 C.F.R. § 552.109(a) will have major adverse effects on the ability of home care agencies to provide services, on the earnings of their employees, and on access to quality care for the many thousands of patients who require their services.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S INVALIDATION OF THE THIRD PARTY EMPLOYER EXEMPTION WILL HAVE MAJOR DETRIMENTAL IMPACTS ON ACCESS TO HOME CARE SERVICES BY ELDERLY AND INFIRM INDIVIDUALS WHO DEPEND ON THOSE SERVICES AS AN ALTERNATIVE TO INSTITUTIONAL CARE

The Second Circuit's decision to eliminate the third party employer exemption will cause reductions in both the availability and the quality of home care services. Invalidation of the Department's third party employer regulation will create insurmountable problems for agencies, for workers and for those in need of home care services.

A. Elimination of the Third Party Employer Exemption Will Harm the Home Care Industry's Ability to Provide Services

Invalidation of the third party employer exemption will result in a dramatic disruption in the home care industry and its provision of services. In specific, the sudden and significant increase in wage rates for overtime hours occasioned by the Second Circuit's invalidation of the exemption will leave agencies no option but to reduce overtime hours, because of the severe financial constraints unique to the home care industry.

In its decisions, the Court of Appeals failed or declined to consider the enormous practical problem the home care industry has faced in its efforts to increase employee wages: the great majority of home care services are funded by Medicare, Medicaid and third-party insurance, which means

that public and private payors, and not providers of home care services, establish rates for home care services. *See* Affidavit of Phyllis Wang, sworn to January 15, 2005, annexed to the Motion to the U. S. Court of Appeals for the Second Circuit for a Stay of the Mandate, submitted by Long Island Care at Home, Ltd. and Maryann Osborne, dated January 17, 2005, at ¶16 ("Wang Aff."). Unlike other employers, home care providers cannot simply raise prices to cover an increase in labor costs — including the enormous increase in the cost of services that must occur in the absence of action by this Court to forestall the impact of the Second Circuit's decision. *Id.*

Under the Medicaid program as it is administered in New York, aide services are reimbursed either at a fixed rate or at a rate based on agency costs reported two years prior to the date of reimbursement. *Id.* at ¶17; *see also* N.Y. Pub. Health Law § 3614 (McKinney 2006). Although Medicaid reimbursement rates might, in theory, be adjusted to accommodate the higher overtime costs that would result from the Second Circuit's decisions, the reimbursement rates would not reflect the increased overtime costs until two years after the cost increase occurred. Wang Aff. at ¶17. And in fact, the State and counties may, and frequently do, choose not to increase reimbursements, in whole, or even at all, to enable providers to meet increased costs. *Id.* at ¶17, n.2. The recent history of funding for Medicaid and Medicare home care services gives no cause for hope that federal, State or local legislatures would increase funding to accommodate higher overtime costs.[2] *Id.*

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2. With Medicaid spending approaching $50 billion in fiscal year 2006-07 — nearly half of New York State's total budget for the year — recent legislative and executive initiatives have focused on reducing Medicaid expenditures, not increasing them.

The reality is that agencies cannot possibly sustain current levels of overtime services, at such dramatically increased cost, for as long as two years before rate changes (if any) would take effect. *Id.* at ¶18. Home care agency budgets have been severely pared back in the last decade, largely as a result of Medicaid and Medicare reimbursement reductions by the State and federal governments. *Id.* The average Medicare-certified home health agency had a profit margin of only 1.53 percent in 2004. National Association for Home Care & Hospice (NAHC) Medicare Cost Report Study (January 2005), NAHC, 228 7th Street, S.E., Washington, D.C. Faced with the prospect of waiting two years for an increase in reimbursement rates, agencies would have no choice but to drastically reduce overtime hours. Wang Aff. at ¶18. The change in the overtime calculation would likely result in uncovered shifts and, thus, an inability to service all individuals who need home care. *Id.* at ¶27. Hiring additional home care workers to cover those hours is not a practical option: even those agencies that do not suffer operating deficits at current reimbursement levels report a shortage of workers. *Id.* at ¶22; *see also* Department of Labor, *Occupational Outlook Handbook*, Bulletin 2600 (2006-07), available at *http://www.bls.gov/oco/* ("*Occupational Outlook Handbook*").

The elimination of the third party employer exemption would result in near-term chaos in the home care industry and long-term loss of home care services that are essential to the health and well-being of many New Yorkers — including, in particular, the medically indigent New Yorkers to whom home care services are inaccessible but for the Medicaid program. Wang Aff. at ¶19.

B. Invalidation of the Regulation Will Hurt Home Care Workers

The unique fiscal constraints to which the home care industry is subject likely will mean that elimination of the third party employer exemption will harm, rather than help, home care workers. *Id.* at ¶20. Home care agencies throughout New York express concern that elimination of the exemption will have a harsh impact on employees by forcing reductions in base wages. *Id.* at ¶22. As noted above, agencies report that they will be prevented from authorizing overtime hours if they are required to change the overtime wage calculation to one and one-half times the employee's regular rate of pay without an offsetting increase in reimbursement. *Id.* at ¶20. Agencies are concerned that a reduction in available work hours will result in increased staff turnover, because employees count on overtime hours to make ends meet. *Id.* at ¶21.

Thus, the policy change effected by the Second Circuit's decisions will worsen, rather than relieve, the conundrum facing the home care industry in its efforts to improve conditions for its workers. *See id.* at ¶23. While elimination of the third-party employer exemption will increase overtime rates for home care workers, agencies throughout New York caution that it will not increase — and in many cases will reduce — actual earnings for workers. *Id.*

C. Invalidation of the Third Party Employer Exemption Will Result in Disruption in Continuity of Care to Patients

Critically, the Second Circuit's decisions fail to account for the potential negative impact on home care clients of the policy change they implement. The elimination of overtime hours will have a powerful impact on the agencies' ability to provide continuity of care to patients — that is, the provision of services consistently by the same caregivers to the same patients. *Id.* at ¶24. Continuity of care is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible. 10 NYCRR § 766.2(a)(3).

If agencies must reduce overtime hours to avoid incurring unreimbursed costs, they will be forced either to eliminate hours of service or to assign more caregivers — each working fewer hours — to service a single patient. *Id.* at ¶25. Many agencies report that they will no longer be able to limit the number of aides assigned to a case or accommodate client requests for the same aides — that is, aides whom the clients have come to know and who are, by experience, knowledgeable about the clients' care needs. *Id.* An increase in the number of caregivers will have a significant deleterious effect on home care clients, who benefit from both the personal comfort and increased quality of service afforded by having only one or two regular care providers.

II. THE SECOND CIRCUIT'S DECISIONS REVERSE DOL'S POLICY DETERMINATIONS AND INTERFERE WITH CONSISTENT NATIONAL ADMINISTRATION OF THE FLSA

The Second Circuit's invalidation of the third party employer exemption will effect a dramatic policy change within that Circuit that is contrary to the Congressional purpose underpinning the exemption and to the informed and reasoned judgment of the Department of Labor, the agency entrusted by Congress to administer and enforce the FLSA. In rendering its decision in *Coke II*, the Second Circuit explicitly acknowledged that the FLSA has multiple, sometimes competing, policy purposes. *Coke II*, Pet. App. at 4a-5a. The court understood that while Congress desired to achieve adequate wages for domestic workers who are regular breadwinners, it also sought to ensure that companionship services remain "affordable for working families." *Coke II*, Pet. App. at 5a. Instead of leaving the balancing of these interests to DOL, however, the Second Circuit effectively negated the policy choices adopted by the agency. As set forth above, the court's invalidation of §552.109(a) will likely harm, rather than help, both companionship workers and the families in need of their services, whom Congress sought to protect.

The Court of Appeals declined to defer to the Department's position in any regard, although it recognized that the Department has given consideration to its current position with respect to § 552.109(a), and that the agency has previously considered and decided against amending the regulation on several occasions. *Coke II*, Pet. App. at 6a. The Second Circuit refused to give deference to § 552.109(a) under *Chevron U.S.A., Inc. v. National*

Resources Defense Council, Inc., 467 U.S. 837 (1984) ("*Chevron*"), although the regulation was promulgated by DOL pursuant to an express Congressional grant to the agency of legislative authority and after notice and comment rulemaking.[3] The court declined to accept the Department's statement that the regulation was promulgated by the agency as an exercise of its lawmaking power. *See Coke II*, Pet. App. 4a; *cf.* Wage and Hour Advisory Memorandum No. 2005-1, Pet App. 63a-64a. Furthermore, the Second Circuit would not defer to the agency's interpretation of its own regulation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court rejected outright the explanation and interpretation of § 552.109(a) offered by the agency in its December 2005 Memorandum. *See Coke II*, Pet. App. at 6a.

By refusing to grant *any* deference to DOL, the Second Circuit effectively reversed the policy determinations that had been rendered by the agency over more than thirty years. The court disregarded "the legitimate policy choices" made by the Department. *See Chevron*, 467 U.S. at 866 (1984).

In *Chevron*, this Court explained that it has consistently deferred to administrative interpretations "whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron*, 467 U.S. at 844. As further explained in *Chevron*, "an agency to which

3. Without reiterating them fully herein, amicus curiae HCP supports and adopts Petitioners' arguments, including those regarding the Second Circuit's erroneous application of the standards set forth in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." It is entirely appropriate for the Executive "branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron*, 467 U.S. at 865.

The instruction in *Chevron* is particularly apropos of the concerns presented by 29 CFR § 552.109(a). The Department's repeated consideration of 29 CFR § 552.109(a) over three decades, under the umbrella of its broad statutory mandate to determine wage and hour issues and with the benefit of its unparalleled expertise on those issues, represents the agency's continued effort to review and reconcile the conflicting policies that Congress committed to the agency's care. The Department has considered "the wisdom of its policy on a continuing basis," *Chevron*, 467 U.S. at 864, as evidenced by its willingness periodically to present proposed rule changes for consideration. *See* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5481, 5485, 5488 (2001); 67 Fed. Reg. 16,668 (2002). The Department has examined the potential effect of the regulation on the availability and the affordability of home care services. *See id.* In deciding to maintain the third party employer exemption, the Department has had the benefit of the comments offered by interested parties, as well as its own unique expertise. The Second Circuit's erroneous refusal to defer to the Department resulted in a reversal of the policy judgment rendered by the agency entrusted with resolving this policy debate.

Finally, because the decisions of the Court of Appeals invalidated the Department's regulation and effected a policy change only within the Second Circuit, they have given rise to inconsistent application of the exemption nationally. In point of fact, DOL has expressly instructed Regional Administrators and District Directors to continue to apply § 552.109(a) in states outside the Second Circuit. U.S. Department of Labor's Wage and Hour Advisory Memorandum 2005-1 (December 1, 2005), Pet. App. 50a. Moreover, as set forth more fully by Petitioners, the Tenth Circuit has twice upheld the validity of § 552.109(a), so the Second Circuit's decisions are in direct conflict with decisions of the Tenth Circuit. *See Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004).

The Second Circuit's decisions have interfered with the Department's consistent administration of the companionship exemption nationally. *Amicus curiae* HCP respectfully urges this Court to grant a writ of certiorari to resolve the conflict created by the decisions in *Coke I* and *Coke II*, on a matter of critical importance to patients, payors and home care service providers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(22)

No. 06-593

FILED
FEB 2 0 2007
CLERK

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,
Petitioners,

v.

EVELYN COKE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED OCTOBER 26, 2006
CERTIORARI GRANTED JANUARY 5, 2007**

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The following opinions have been omitted from the Joint Appendix because they appear at the indicated pages of the Appendix to the Petition for a Writ of Certiorari:

Opinion of the United States Court of Appeals for the Second Circuit on Remand ..... Pet. App. 1a

Opinion of the United States Court of Appeals for the Second Circuit ..... Pet. App. 7a

Opinion of the United States District Court for the Eastern District of New York ..... Pet App. 33a

The following document appears at the indicated page of the Appendix to the Petition for a Writ of Certiorari:

Wage and Hour Advisory Memorandum No. 2005-1 ..... Pet. App. 50a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Brooklyn (Central Islip)

Case No. 2:02-cv-02010-TCP

EVELYN COKE, *individually and on behalf of others similarly situated,*
Plaintiff,

v.

LONG ISLAND CARE AT HOME, LTD., *et al.*,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/02/2002	1	Complaint filed and summons issued as to defendant(s) Long Island Care at Home, Ltd., Maryann Osborne. Filing fee $150.00. Receipt number: 259868. Jury trial demanded. Filed by Leon Greenberg on behalf of Evelyn Coke. (Attachments: # 1 Civil Cover Sheet) (Romano, Daniel) (Entered: 04/08/2002)
		* * * *
09/03/2002	6	Answer to complaint. filed by Arnold S. Klein on behalf of Long Island Care at Home, Ltd., Maryann Osborne. (Lopez, Adriana) (Entered: 09/05/2002)
		* * * *
03/19/2003	10	MOTION to Dismiss *Pltff's complaint* by Long Island Care at Home, Ltd., Maryann Osborne. (Lopez, Adriana) (Entered: 03/27/2003)

DATE	NO.	PROCEEDINGS
03/19/2003	11	DECLARATION of Arnold Klein in Support of Motion to dismiss the pltff's complaint. Filed by Long Island Care at Home, Ltd., Maryann Osborne. (Lopez, Adriana) (Entered: 03/27/2003)
03/19/2003	12	MEMORANDUM in Support of the [10] MOTION to Dismiss *Pltff's complaint* by Long Island Care at Home, Ltd., Maryann Osborne. (Lopez, Adriana) (Entered: 03/27/2003)
03/19/2003	13	MEMORANDUM in Opposition to the [10] MOTION to Dismiss *Pltff's complaint* by Evelyn Coke. (Lopez, Adriana) (Entered: 03/27/2003)
03/19/2003	14	REPLY Memorandum in further support of [10] MOTION to *Dismiss Pltff's* complaint filed by Long Island Care at Home, Ltd., Maryann Osborne. (Lopez, Adriana) (Entered: 03/27/2003)
03/19/2003	15	Cross MOTION to Compel *an Order directing the circulation of a Notice of pendency in this matter. Filed* by Evelyn Coke. (Lopez, Adriana) (Entered: 03/28/2003)
03/19/2003	16	MEMORANDUM in Support of Cross MOTION to Compel *an Order directing the circulation of a Notice of pendency in this matter. Filed* by Evelyn Coke. (Lopez, Adriana) (Entered: 03/28/2003)

DATE	NO.	PROCEEDINGS
03/19/2003	17	DFT's REPLY memorandum in Opposition to the [15] Cross MOTION to Compel an *Order directing the circulation of a Notice of pendency in this matter. Filed* by Long Island Care at Home, Ltd. (Lopez, Adriana) (Entered: 03/28/2003)
03/19/2003	18	REPLY memorandum of law in further Support of the [15] Cross MOTION to Compel *an Order directing the circulation of a Notice of pendency in this matter. Filed* by Long Island Care at Home, Ltd. (Lopez, Adriana) (Entered: 03/28/2003)
04/02/2003	19	Minute Entry for proceedings held before Judge Thomas C. Platt: Motion Hearing held on 4/2/2003 at 10:30 am re: Dft's motion to dismiss and pltffs Cross MOTION to Compel *an Order directing the circulation of a Notice of pendency. Counsel for all side present. Motions argued by all sides. Decision reserved. Pltff filed the case as a test case, the court will decide how it wishes to proceed. (Court Reporter H. Rapaport.) (Lopez, Adriana) (Entered: 04/09/2003)*
		* * * *
05/07/2003	24	PLTFF'S SUPPLEMENTAL MEMORANDUM of law with exhibits in Opposition to dfts' motion for judgment on the pleadings. (Lopez, Adriana) (Entered: 05/15/2003)

DATE	NO.	PROCEEDINGS
05/07/2003	27	Letter dated 5/6/03 from Leon Greenberg to USDJ Platt re: I would like to advise the Court that the memorandum raises the new issue of whether 29 C.F.R. 552.109 is procedurally invalid for failing to have been adopted. (Lopez, Adriana) (Entered: 05/27/2003)
05/09/2003	23	Letter dated 5/9/03 from Arnold Klein to USDJ Platt re: We are writing to object to the supplemental memorandum just submitted by plaintiff's counsel, and wish to know how the court wants us to proceed. (Lopez, Adriana) (Entered: 05/15/2003)
05/12/2003	25	Letter dated 5/9/03 from Arbold [sic] Klein to USMJ Lindsay re: Writing to provide your Hnor with a status report as to dfts' motion for judgment on the pleadings. We are submitting supplemental submissions (Lopez, Adriana) (Entered: 05/16/2003)
05/12/2003		ORDER: Parties to provide further status letter by 7/1/03. So Ordered. Signed by Judge Arlene R. Lindsay on 5/12/03. cf/eod 25 (Lopez, Adriana) (Entered: 05/16/2003)
05/16/2003	26	DFTS' SUPPLEMENTAL MEMORANDUM of law in further Support of [10] MOTION to Dismiss Pltff's complaint. Filed by by Long Island Care at Home, Ltd., Maryann Osborne. (Lopez, Adriana) (Entered: 05/27/2003)

DATE	NO.	PROCEEDINGS
05/20/2003	28	TRANSCRIPT of Proceedings held on 4/2/03 @ 10:30 am. before Judge USDJ Platt. Court Reporter: Harry Rapaport. (Lopez, Adriana) (Entered: 05/27/2003)
05/23/2003	29	ORDER: Dfts' motion for Judgment on the pleadings is GRANTED. Pltff's motion for circulation of a Notice of pendency and of a concent [sic] to Joinder to similarly situated persons pursuant to 29USC216(b) is DENIED. Signed by Judge Thomas C. Platt on 5/23/03. cm (Lopez, Adriana) (Entered: 05/30/2003)
05/30/2003	30	JUDGMENT: Pltff take nothing of dfts; Dfts' motion for judgment on the pleadings is granted; and pltff's motion for circulation of pendency is denied. Signed by Deputy Clerk Ralph Branciforte on 5/30/03. Copies Mailed. (Lopez, Adriana) (Entered: 05/30/2003)
06/24/2003	31	NOTICE OF APPEAL by Evelyn Coke, appellant, from judgment/order granting deft's motion for summary judgment. Aff. of service attached. Filing fee $105.00 paid, receipt number 279446. Judge notified. (Glenn, Marilyn).(Entered: 06/27/2003)
06/27/2003		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 31 Notice of Appeal. (Glenn, Marilyn) (Entered: 06/27/2003)

* * * *

DATE	NO.	PROCEEDINGS
07/28/2003	32	USCA Scheduling Order as to 31 Notice of Appeal filed by Evelyn Coke, Transmission of Notice of Appeal and Docket Sheet to USCA. Appeal Record due by 8/21/2003. Appellant's brief due 8/28/03; appellee's brief due 9/29/03; argument not earlier than 11/10/03. (Romano, Daniel) Modified on 10/3/2003 (Romano, Daniel). (Entered: 10/03/2003)
09/25/2003		DESIGNATION of Record on Appeal by Evelyn Coke re 31 Notice of Appeal, including original and three copies of the index, certified docket and clerk's certificate. Acknowledgment requested. (Romano, Daniel) (Entered: 10/03/2003)
10/17/2003	33	USCA Acknowledgment for 31 Notice of Appeal filed by Evelyn Coke. USCA no. 03-7666 (Romano, Daniel) (Entered: 10/21/2003)
02/02/2006	34	Copy of letter from U.S. Supreme Court to USCA, 2nd Circuit, re cert. granted. Copy sent to chambers. (Romano, Daniel) (Entered: 02/08/2006)
04/19/2006	35	ORDER of USCA(copy): The Court is asking the parties to submit supplemental briefs as to 31 Notice of Appeal filed by Evelyn Coke. Applellant's brief due 14 days from the date of this order. Appellee's response due 7 days after that date. USCA# 03-7666-cv. (Duong, Susan) (Entered: 04/20/2006)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 2:02-cv-02010-TCP

EVELYN COKE, *individually and on behalf of others similarly situated,*
Plaintiff,

v.

LONG ISLAND CARE AT HOME, LTD., *et al.*,
Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
6/30/2003	Copy of district court judgment- RECEIVED. [03-7666] [Entry date Jul 8 2003] [DT]
6/30/2003	Copy of district court memorandum and order RECEIVED. [03-7666] [Entry date Jul 8 2003] [DT]
7/11/2003	Appellant Evelyn Coke Form C filed, with proof of service. [03-7666] Form C deadline satisfied. [Entry date Jul 17 2003] [DT]
7/11/2003	Appellant Evelyn Coke Form D filed, with proof of service. [03-7666] Form D deadline satisfied. [Entry date Jul 17 2003] [DT]
	* * * *
10/6/2003	Record on appeal index in lieu of record filed. [Entry date Oct 8 2003] [DT]
10/10/2003	Appellant Evelyn Coke brief FILED with proof of service. [Entry date Oct 14 2003] [DT]

DATE	PROCEEDINGS
10/10/2003	Appellant Evelyn Coke joint appendix filed w/pfs. Number of volumes: 1. [Entry date Oct 14 2003] [DT]
	* * * *
12/5/2003	Appellee Long Island Care at, Appellee Maryann Osborne motion to attach district court memorandum FILED (w/pfs). [2495395-1] [Entry date Dec 9 2003] [DT]
12/8/2003	New party added: U.S. Dept. of Labor. [Entry date Dec 10 2003] [DT]
12/8/2003	Amicus Curiae U.S. Dept. of Labor brief filed with proof of service. [Entry date Dec 10 2003] [DT]
12/9/2003	Letter dated 12/5/03 from Craig Becker, Esq., informing the Court that he is not opposed to appellees' motion to file letter brief with district court memorandum received [Entry date Dec 9 2003] [DT]
	* * * *
12/12/2003	Appellee Long Island Care at, Appellee Maryann Osborne LETTER BRIEF filed with proof of service. Satisfy appellee's brief due. [Entry date Dec 12 2003] [DT]
12/12/2003	Order (endorsed on appellant's letter submitted by Craig Becker, Esq. filed stating re: The above request is hereby granted. (SB) Note: Appellant requests to file a 10 page reply brief. [Entry date Dec 12 2003] [DT]
	* * * *

DATE	PROCEEDINGS
12/12/2003	Order FILED GRANTING motion to attach district court memorandum [2495395-1] by Appellee Long Island Care at, Maryann Osborne, endorsed on motion form dated 12/5/03. (SB) [Entry date Dec 12 2003] [DT]
	* * * *
12/29/2003	Appellant Evelyn Coke reply brief filed with proof of service. Satisfy appellant's reply brief due, [Entry date Dec 31 2003] [DT]
1/21/2004	Letter dated 1/13/04 from Craig Becker, Esq., suggesting that the U.S. Dept. of Labor be invited to argue on behalf of the appellee received [Entry date Jan 26 2004] [EA]
	* * * *
2/6/2004	Amicus Curiae U.S. Dept. of Labor motion to allow oral argument filed with proof of service. [Entry date Feb 13 2004] [EA]
	* * * *
2/20/2004	Order FILED GRANTING motion to allow oral argument by Amicus Curiae U.S. Dept. of Labor, endorsed on motion dated 2/6/2004 [Entry date Feb 20 2004] [JC]
3/4/2004	Case heard before WALKER, CH.J; KATZMANN, C.JJ; GLEESON, D.J CD DATE: 3/4/04 [Entry date Mar 4 2004] [RD]
7/22/2004	Judgment of the district court is Affirmed in part; Vacated in part; and Remanded by published signed opinion filed. (JMW) [Entry date Jul 22 2004] [EA]
7/22/2004	Judgment filed. [Entry date Jul 22 2004] [EA]

DATE	PROCEEDINGS
	* * * *
9/7/2004	MOVANT Home Care Council of New York City, Inc., brief received. (Problem: Pending motion for leave to file) [Entry date Sep 10 2004] [EA]
9/7/2004	MOVANT Home Care Association of New York State, Inc., brief received. (Problem: Pending motion for leave to file) [Entry date Sep 10 2004] [EA]
9/7/2004	MOVANT New York State Association of Health Care Providers, Inc., brief received. (Problem: Pending motion for leave to file) [Entry date Sep 10 2004] [EA]
9/7/2004	Appellee Long Island Care at, Appellee Maryann Osborne Petition for rehearing and petition for rehearing en banc filed with proof of service. [Entry date Sep 10 2004] [EA]
9/7/2004	Movant Home Care Council of New York City, Inc. motion file brief as amicus curiae filed with proof of service. [Entry date Sep 10 2004 [EA]
9/7/2004	Movant Home Care Association of New York State, Inc. motion file brief as amicus curiae filed with proof of service. [Entry date Sep 10 2004] [EA]
9/7/2004	Movant New York State Association of Health Care Providers, Inc. motion file brief as amicus curiae filed with proof of service. [Entry date Sep 10 2004] [EA]
	* * * *

DATE	PROCEEDINGS
9/10/2004	Movant National Association for Home Care & Hospice motion file brief as amicus curiae filed with proof of service. [Entry date Sep 13 2004] [EA]
	* * * *
9/13/2004	Movant New York City motion file brief as amicus curiae filed with proof of service. [Entry date Sep 13 2004] [EA]
	* * * *
9/14/2004	Movant Continuing Care Leadership Coalition, Inc. motion file brief as amicus curiae filed with proof of service. [Entry date Sep 15 2004] [EA]
	* * * *
1/10/2005	Order FILED DENYING motion Petition for rehearing by Appellee Long Island Care at, Appellee Maryann Osborne, endorsed on motion dated 9/14/2004, Order FILED DENYING motion petition for rehearing en banc by Appellee Long Island Care at, Appellee Maryann Osborne, endorsed on motion dated 9/14/2004. (AH) [Entry date Jan 11 2005] [EA]
1/10/2005	Order FILED DENYING motion file brief as amicus curiae by Movant Home Care Council of New York City, Inc., endorsed on motion dated 9/14/2004. (AH) [Entry date Jan 11 2005] [EA]
1/10/2005	Order FILED DENYING motion file brief as amicus curiae by Movant New York City, endorsed on motion dated 9/14/2004. (AH) [Entry date Jan 11 2005] [EA]

DATE	PROCEEDINGS
1/10/2005	Order FILED DENYING motion file brief as amicus curiae by Movant National Association for Home Care & Hospice, endorsed on motion dated 9/14/2004. (AH) [Entry date Jan 11 2005] [EA]
1/10/2005	Order FILED DENYING motion file brief as amicus curiae by Movant New York State Association of Health Care Providers, Inc., endorsed on motion dated 9/14/2004. (AH) [Entry date Jan 11 2005] [EA]
1/10/2005	Order FILED DENYING motion file brief as amicus curiae by Movant Home Care Association of New York State, Inc., endorsed on motion dated 9/14/2004. (AH) [Entry date Jan 11 2005] [EA]
1/10/2005	Order FILED DENYING motion file brief as amicus curiae by Movant Home Care Association of New York State, Inc., Movant Continuing Care Leadership Coalition, Inc., endorsed on motion dated 9/14/2004. (AH) [Entry date Jan 11 2005] [EA]
	* * * *
1/17/2005	Appellee Long Island Care at, Appellee Maryann Osborne motion to stay the mandate filed with proof of service. [Entry date Jan 18 2005] [AM]
1/21/2005	Appellant Evelyn Coke, memorandum in opposition to motion stay the mandate filed with proof of service. [Entry date Jan 25 2005] [EA]

DATE	PROCEEDINGS
1/25/2005	Letter dated 1/25/05 from Daniel Alter, Esq., in response to memorandum in opposition to motion to stay mandate, received [Entry date Jan 26 2005] [EA]
	* * * *
3/22/2005	Order FILED GRANTING motion stay the mandate by Appellee Long Island Care at, Appellee Maryann Osborne, endorsed on motion dated 1/17/2005. IT IS HEREBY ORDERED that the motion by appellee to stay mandate pending application to the Supreme Court for certiorari review is GRANTED. Before: Hon. John M. Walker, Jr., Chief Judge, Hon. Robert A. Katzmann, Circuit Judge, Hon. John Gleeson, District Judge.(TWY) [Entry date Mar 22 2005] [EA]
4/5/2005	Letter dated 3/30/05 from Daniel Alter, Esq., regarding FRAP 41(d)(2)(B) automatic stay received [Entry date Apr 6 2005] [EA]
	* * * *
1/26/2006	Writ of Certiorari GRANTED. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit, for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005). [Entry date Jan 30 2006] [EA]
2/16/2006	Faxed Letter dated 2/7/06 from Daniel Alter, Esq., regarding the granted writ of certiorari, received [Entry date Feb 21 2006] [EA]

DATE	PROCEEDINGS
3/2/2006	Copy of noticed [sic] by Supreme Court RECEIVED: Clerk's Costs: $300.00. [Entry date Mar 9 2006] [EA]
3/13/2006	Letter received from Craig Becker, Esq. requesting a new briefing schedule and reargument. [Entry date Mar 15 2006] [AM]
3/17/2006	AMICUS CURIAE U.S. Dept. of Labor, 28(J) letter received. [Entry date Mar 17 2006] [AM]
3/20/2006	AMICUS CURIAE U.S. Dept. of Labor, 28(J) letter received. [Entry date Mar 21 2006] [AM]
4/7/2006	Order filed stating: The Court is asking the parties in the above-captioned case to submit supplemental briefs, not to exceed ten (1) [sic] single-spaced pages, addressing the following issues: 1) What arguments or issues does the Department of Labor's ("DOL") December 1, 2005, Wage and Hour Advisory Memorandum raise that differ from the arguments presented to this court by Long Island Care at Home in the 2004 litigation. 2) If there are, in fact, no new arguments or issues presented in the DOL memorandum, how does that memorandum affect this court's analysis of the case. The parties need not restate arguments already presented to this court except to the extant [sic] that the DOL's 2005 memorandum affects either the arguments themselves or the legal analysis of the arguments on which this court rested its conclusions. The court does not intend to schedule supplemental oral argument in this case. Appellant's brief is due fourteen (14) days from the date of this order. Appellee's response is due seven (7) days

DATE	PROCEEDINGS
	after that date. FOR THE COURT: Thomas W. Asreen, Acting Clerk of Court. ([JMW, Ch.J.] RAK, CJ, JGleeson, DJ, EDNY). [Entry date Apr 7 2006] [PC]
	* * * *
6/2/2006	APPELLANT Evelyn Coke, supplemental brief filed with proof of service. [Entry date Jun 15 2006] [EA]
	* * * *
6/7/2006	AMICUS CURIAE AARP Foundation Litigation, brief filed with proof of service. [Entry date Jun 15 2006] [EA]
	* * * *
6/12/2006	APPELLEE Long Island Care at, Maryann Osborne, supplemental brief filed with proof of service. [Entry date Jun 15 2006] [EA]
	* * * *
6/20/2006	AMICUS CURIAE U.S. Dept. of Labor, brief filed with proof of service. [Entry date Jun 22 2006] [EA]
6/21/2006	AMICUS CURIAE New York City, New York State Association of Counties, brief filed with proof of service. [Entry date Jun 22 2006] [EA]
6/21/2006	AMICUS CURIAE New York State Association of Health Care Providers, Inc., brief filed with proof of service. [Entry date Jun 22 2006] [EA]
	* * * *

DATE	PROCEEDINGS
6/21/2006	Movant Continuing Care Leadership Coalition, Inc. motion file brief as amicus curiae filed with proof of service. [Entry date Jun 22 2006 [EA]
6/22/2006	AMICUS CURIAE Home Care Association of New York, Inc., brief filed with proof of service. [Entry date Jul 5 2006 [NG]
7/5/2006	AMICUS CURIAE Continuing Care Leadership Coalition, Inc., brief filed with proof of service. [Entry date Jul 12 2006 [EA]
7/5/2006	Order FILED GRANTING motion file brief as amicus curiae by Movant Continuing Care Leadership Coalition, Inc., endorsed on motion dated 6/21/2006. Before: Hon. John M. Walker, Jr., Chief Judge, Hon. Robert A. Katzmann, Circuit Judge, Hon. John Gleeson, District Judge/EDNY. IT IS HEREBY ORDERED that the motion for leave to file an amicus curiae brief is GRANTED. (TWY) [Entry date Jul 12 2006 [EA]
	* * * *
8/31/2006	Judgment of the district court is Affirmed in part, Vacated in part, and Remanded by published unsigned PER CURIAM opinion filed. [Entry date Aug 31 2006] [EA]
8/31/2006	Judgment filed. [Entry date Aug 31 2006] [EA]
	* * * *
9/20/2006	Appellee Maryann Osborne, Appellee Long Island Care at motion to stay the mandate filed with proof of service. [Entry date Sep 20 2006] [AM]

DATE	PROCEEDINGS
9/28/2006	Appellant Evelyn Coke, memorandum in opposition to motion stay the mandate filed with proof of service. [Entry date Oct 4 2006] [EA]
10/4/2006	Letter dated 10/4/06 from Daniel S. Alter, Esq., in further support of motion to stay mandate, and in response to opposition to stay mandate, received [Entry date Oct 4 2006] [EA]
10/10/2006	Order FILED GRANTING motion stay the mandate by Appellee Long Island Care at, Appellee Maryann Osborne, endorsed on motion dated 9/20/2006. Before: John M. Walker, Jr., Hon. Robert A. Katzmann, Circuit Judges, Hon. John Gleeson, District Judge/EDNY IT IS HEREBY ORDERED that Appellee's motion to stay the mandate for ninety (90) days pending submission of a petition for writ of certiorari to the United States Supreme Court is GRANTED.(TWY) [Entry date Oct 13 2006] [EA]
	* * * *
11/2/2006	Letter dated 10/31/06 from Daniel S. Alter, Esq., informing the Court that a Writ of Certiorari was filed with the United States Supreme Court, received [Entry date Nov 13 2006] [EA]
11/6/2006	Notice of filing petition for APPELLEE Long Island Care at, Maryann Osborne, dated 10/30/06 filed. Supreme Court #: 06-593. [Entry date Nov 9 2006] [EA]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 02 2010

EVELYN COKE, individually and on behalf of others similarly situated,

Plaintiff,

-against-

LONG ISLAND CARE AT HOME, Ltd. and MARYANN OSBORNE,

Defendants.

COMPLAINT

The Plaintiff, by her attorney Leon Greenberg P.C., as and for a Complaint against the defendants, states and alleges, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. This Court has jurisdiction over the claims presented on the First Cause Of Action herein pursuant to the Act of June 25, 1938, ch 676, 52 Stat 1069, 29 USC Sections 201-219, known as the Fair Labor Standards Act ("the FLSA" or "the Act"), a law of the United States regulating interstate commerce, and specifically under the provisions of Section 16 of said act, as amended (29 U.S.C. § 216(b)).

2. This Court has jurisdiction over the New York State Law claims that are made under the Labor Law of the State of New York, and the New York Minimum Wage Act (the "NYMWA") in the Second Cause of Action pursuant to 28 U.S.C. § 1367(a).

3. The plaintiff EVELYN COKE (the "named plaintiff") is a resident of the State of New York and the County of Queens and is a former employee of one or more of the defendants.

4. The defendant LONG ISLAND CARE AT HOME, LTD. (the "corporate defendant") is a corporation formed pursuant to the Laws of the State of New York.

5. The defendant MARYANN OSBORNE is the owner or sole shareholder of the corporate defendant.

6. The defendant MARYANN OSBORNE is a partial shareholder of the corporate defendant.

7. The defendant MARYANN OSBORNE is a director of the corporate defendant.

8. The defendant MARYANN OSBORNE is an officer of the corporate defendant.

9. The defendant MARYANN OSBORNE by virtue of her status as an owner, shareholder, director, and officer of the corporate defendant exercises complete control over the corporate defendant.

10. The plaintiff has been an employee of one or more of the defendants during the time period pertinent to this complaint, to wit, the three years and six years immediately preceding the initiation of this action. The plaintiff has performed labor and services in various occupations that are subject to the provisions of the FLSA and New York State Labor Law that are mentioned herein. These occupations include, but are not limited to, work as a home healthcare attendant.

11. The defendants engage in a for-profit business which has gross revenue in excess of $500,000 per annum and is engaged in the production of goods for interstate commerce and/or the use and/or handling of goods which have moved in

interstate commerce as such terms are defined in the FLSA and are employers subject to the jurisdiction of the FLSA.

12. The individual defendant, by intentionally acting to violate the laws, rules, regulations, statutes and wage orders alleged herein, and by virtue of her position as controlling owner and/or manager of the corporate defendant, has acted as plaintiff's employers and have assumed personal liability for the claims of the plaintiff herein.

13. That the various violations of law which are alleged herein were committed intentionally and/or willfully by the defendants.

14. That there are numerous persons who are similarly situated to the named plaintiff in respect to the named plaintiff's claims under the FLSA and the NYMWA and the other provisions of the Labor Law of the State of New York in that such similarly situated persons, like the named plaintiff, performed substantial work, labor and services for the defendants for which such persons did not receive the compensation required by the FLSA and the NYMWA and the other provisions of the Federal Labor Law and the Labor Law of the State of New York.

15. That the persons similarly situated to the named plaintiff and described in paragraph 14 constitute, for the purposes of the NYMWA, a class of persons that is so numerous that joinder of all such persons individually is impractical.

16. There are questions of law and fact common to the class which predominate over any questions affecting only individual members, specifically whether the defendants have any legal obligation to the class members under the NYMWA and the other provisions of Labor Law of the State of New York and if so what is the extent of such obligation.

17. The claims of the named plaintiff are typical of the claims of the above described class, in that the interests of the

named plaintiff are co-extensive with the interests of the other members of the class, there is a lack of adverse interests between the named plaintiff and the other members of the class, and common questions exist.

18. The named plaintiff will fairly and adequately protect the interests of said class.

19. A class action is superior to other available methods for the fair and efficient adjudication of the class claims under the NYMWA and the other provisions of the Labor Law of the State of New York.

20. The named plaintiff brings the Second Cause of Action herein on behalf of herself individually and all persons similarly situated as a class action pursuant to Federal Rules of Civil Procedure Rule 23, in respect to all claims that the named plaintiff and all persons similarly situated have against defendants as a result of the defendants' violations of the NYMWA and the Wage Orders issued thereunder and the other provisions of the Labor Law of the State of New York.

AS AND FOR A FIRST CAUSE OF ACTION PURSUANT TO THE FEDERAL FAIR LABOR STANDARDS ACT ON BEHALF OF THE NAMED PLAINTIFF AND SUCH OTHER PERSONS WHO CONSENT IN WRITING TO JOIN THIS ACTION PURSUANT TO 29 U.S.C. § 216(B)

21. The named plaintiff brings this First Cause of Action pursuant to 29 U.S.C. § 216(b) on behalf of herself and all other similarly situated persons who consent in writing to join this action pursuant to 29 U.S.C. § 216(b), and upon information and belief there are numerous such similarly situated persons.

22. Pursuant to the applicable provisions of the FLSA, 29 U.S.C. § 206 and § 207, plaintiff was entitled to minimum wages and an overtime hourly wage of time and one-half her regular hourly wage for all hours worked in excess of forty

hours per week, plaintiff worked more than 40 hours per week for the defendants, and defendants willfully failed to make said overtime and/or minimum wage payments.

23. The named plaintiff on behalf of herself and all other similarly situated persons who consent in writing to join this action, seeks, on this First Cause of Action, a judgment for unpaid overtime wages and minimum wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the named plaintiff and such other similarly situated persons who consent in writing to join this action, and plaintiff also seeks an award of liquidated damages, attorney's fees, interest and costs as provided for by the FLSA.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF THE NAMED PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO THE NEW YORK STATE LABOR LAW

24. Plaintiff repeats and realleges each and every allegation previously made herein.

25. Pursuant to the New York Minimum Wage Act (the "NYMWA"), New York Labor Law Articles 6 and 19, New York Labor Law § 191, and the Wage Orders issued under the NYMWA at 12 N.Y.C.R.R. §§ 137-142, plaintiff was entitled to certain overtime wages, minimum wages and other wages, all of which the defendants failed to pay in violation of such laws.

26. Wherefore, the named plaintiff, on behalf of herself and the within described class of other persons similarly situated on this Second Cause of Action, seeks a judgment against the defendants for all wages which should have been paid, but were not paid, to the named plaintiff and such class members pursuant to the NYMWA and the Wage Orders issued thereunder and the other provisions of the Labor Law of the State of New York the total amount of such unpaid

wages to be determined at trial upon an accounting of the hours worked by, and wages paid to, the named plaintiff and the other class members, along with an award of attorney's fees, interest and costs as provided under the NYMWA and New York State Labor Law § 198 and § 663.

WHEREFORE, plaintiff demands judgment and a trial by jury against the defendants on each cause of action as specified aforesaid, together with such other further and different relief that the Court deems just.

Dated: New York, New York
March 29, 2002

Yours, Etc.,

LEON GREENBERG, P.C.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed SEP 3, 2002]

CV-02-2010

EVELYN COKE, individually and on behalf of others similarly situated

Plaintiff,

-against-

LONG ISLAND CARE AT HOME, LTD. and MARYANN OSBORNE,

Defendants.

ANSWER

Defendants Long Island Care at Home, Ltd. ("LI Care") and Maryann Osborne ("Osborne") (collectively, "Defendants"), by and through their attorneys Meltzer, Lippe & Goldstein, LLP, as and for their answer to plaintiff's complaint (the "Complaint"), aver as follows:

1. Deny the allegations contained in paragraph "1" of the Complaint.

2. Deny the allegations contained in paragraph "2" of the Complaint.

3. With respect to the allegations contained in paragraph "3" of the Complaint, admit that plaintiff is a former employee of LI Care, deny that plaintiff is a former employee of Osborne, and otherwise aver that they are without knowledge or information sufficient to form a belief as to the truth of said allegations.

4. Admit the allegations contained in paragraph "4" of the Complaint.

5. Deny the allegations contained in paragraph "5" of the Complaint.

6. Admit the allegations contained in paragraph "6" of the Complaint.

7. Admit the allegations contained in paragraph "7" of the Complaint.

8. Admit the allegations contained in paragraph "8" of the Complaint.

9. Deny the allegations contained in paragraph "9" of the Complaint.

10. With respect to the allegations contained in paragraph "10" of the Complaint, admit that plaintiff has been employed by LI Care as a home healthcare attendant and that while so employed was subject to the provisions of the New York State Labor Law, but otherwise deny the allegations.

11. With respect to the allegations contained in paragraph "11" of the Complaint, admit that LI Care engages in a for-profit business which has generated gross revenues in excess of $500,000 per annum, but otherwise deny the allegations.

12. Deny the allegations contained in paragraph "12" of the Complaint.

13. Deny the allegations contained in paragraph "13" of the Complaint.

14. Deny the allegations contained in paragraph "14" of the Complaint.

15. Deny the allegations contained in paragraph "15" of the Complaint.

16. Deny the allegations contained in paragraph "16" of the Complaint.

17. Deny the allegations contained in paragraph "17" of the Complaint.

18. Deny the allegations contained in paragraph "18" of the Complaint.

19. Deny the allegations contained in paragraph "19" of the Complaint.

20. With respect to the allegations contained in paragraph "20" of the Complaint, admit that plaintiff purports to bring the Second Cause of Action as a class action, but otherwise deny the allegations.

AS TO THE FIRST CAUSE OF ACTION

21. With respect to the allegations contained in paragraph "20" of the Complaint, admit that plaintiff purports to bring the First Cause of Action pursuant to 29 U.S.C. § 216(b), but otherwise deny the allegations.

22. Deny the allegations contained in paragraph "22" of the Complaint.

23. With respect to the allegations contained in paragraph "23" of the Complaint, admit that plaintiff seeks the relief described therein, but otherwise deny the allegations.

AS TO THE SECOND CAUSE OF ACTION

24. With respect to paragraph "24" of the Complaint, repeat and reallege their responses to paragraphs "1" through "23" of the Complaint as if fully set forth herein.

25. Deny the allegations contained in paragraph "25" of the Complaint.

26. Deny the allegations contained in paragraph "26" of the Complaint.

FIRST AFFIRMATIVE DEFENSE

27. The Complaint should be dismissed for failure to state a cause of action.

SECOND AFFIRMATIVE DEFENSE

28. The Complaint should be dismissed as against defendant Osborne for failure to state any grounds upon which she could be individually liable for the conduct alleged and/or purported damages or relief sought therein.

THIRD AFFIRMATIVE DEFENSE

29. "Companion" and/or "live-in" workers such as plaintiff are exempt from eligibility for minimum wage and overtime compensation under the Fair Labor Standards Act ("FLSA") and the implementing regulations, which have been adopted by the New York State Department of Labor and, as such, all claims for such relief under the FLSA must be discussed.

FOURTH AFFIRMATIVE DEFENSE

30. Since Plaintiff was exempt from eligibility for overtime compensation pursuant to the FLSA, she is not entitled to overtime compensation under New York law pursuant to the New York Miscellaneous Wage Order.

FIFTH AFFIRMATION [SIC] DEFENSE

31. This Court lacks subject matter jurisdiction over the claims asserted in the Complaint.

SIXTH AFFIRMATIVE DEFENSE

32. Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitation.

SEVENTH AFFIRMATIVE DEFENSE

33. This action cannot be certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

EIGHTH AFFIRMATIVE DEFENSE

34. Plaintiff has been paid all compensation due her and, as such, cannot state a cause of action.

NINTH AFFIRMATIVE DEFENSE

35. Since Defendants relied in good faith upon the companionship exemption set forth in the FLSA, Defendants cannot be liable for back pay, unpaid overtime wages or other relief under the FLSA in accordance with the Portal-To-Portal Act and, therefore, cannot be liable under New York law for unpaid overtime compensation pursuant to the New York Miscellaneous Wage Order.

WHEREFORE, Defendants demand judgment against plaintiff dismissing the Complaint in its entirety, and for such other and further relief as the Court deems just under the circumstances.

Dated: Mineola, New York
August 23, 2002

Respectfully submitted,

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(12)

No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in refusing to give deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to a thirty-year-old Department of Labor regulation—a regulation that has twice been upheld by the Tenth Circuit—on the ground that, even though it was promulgated under express grants of legislative authority and after full notice-and-comment rulemaking, the regulation was contained in a subpart headed "Interpretations."

2. Whether, in holding that a longstanding Department of Labor regulation was not persuasive and thus undeserving of any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Second Circuit erred by failing to address the governing provisions of the Fair Labor Standards Act and by declining to give any weight to the Department's interpretation of its own regulations.

RULE 29.6 STATEMENT

Petitioner Long Island Care at Home, Ltd. has no parent company, and there are no publicly held companies that hold any stock of Long Island Care at Home, Ltd.

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IN THE

Supreme Court of the United States

No. 06-593

LONG ISLAND CARE AT HOME, LTD. AND
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-6a) is reported at 462 F.3d 48. The initial opinion of the court of appeals (Pet. App. 7a-32a) is reported at 376 F.3d 118. The opinion of the United States District Court for the Eastern District of New York (Pet. App. 33a-48a) is reported at 267 F. Supp. 2d 332.

JURISDICTION

The judgment of the court of appeals on remand was entered on August 31, 2006. The petition for a writ of certiorari was filed on October 26, 2006, and was granted on January 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the relevant regulations of the Department of Labor promulgated thereunder, are set forth at Pet. App. 65a-83a.

STATEMENT

This case involves a challenge to the validity of 29 C.F.R. § 552.109(a)—a regulation promulgated by the Department of Labor in 1975 after full notice-and-comment rulemaking—which declares that workers providing companionship services to the elderly and infirm are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act, *see* 29 U.S.C. § 213(a)(15) (providing exemption), even if they are employed by third parties rather than by the homeowner receiving care. Granting deference to the Department under the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the district court upheld the regulation. Pet. App. 33a-48a. The Second Circuit reversed, refusing to accord deference to the Department under either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7a-32a. After this Court vacated that decision, and remanded the case for consideration of further guidance provided by the Department, the Second Circuit adhered to its prior ruling and again held Section 552.109(a) to be unenforceable. Pet. App. 1a-6a.

A. The Statutory and Regulatory Framework

The issues in this case arise under certain provisions of the 1974 Amendments to the Fair Labor Standards Act (the "Act"). *See* Pub. L. 93-259, 88 Stat. 55. Prior to the Amendments, workers were typically entitled to receive a specified minimum wage and enhanced pay for overtime only if they were employed by an "enterprise engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. §§ 206(a), 207(a). *See generally National League of Cities v.*

Usery, 426 U.S. 833, 837-38 (1976); *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 295 n.8 (1985). At that time, the Act defined such an enterprise as an enterprise that, among other things, had annual gross sales of at least $250,000. *See* 29 U.S.C. § 203(s)(1) (1976). The annual limit has since been doubled to $500,000. *See* 29 U.S.C. § 203(s)(1)(A)(ii).

In 1974 Congress amended the Act to provide coverage for a particular class of workers: "Employees in domestic service." *See* 29 U.S.C. §§ 206(f), 207(*l*). Unlike most earlier provisions of the Act, the new Amendments defined the scope of coverage for domestic service workers primarily on the basis of the type of job that they performed. Thus, Section 206(f) required payment of a minimum wage to "[a]ny employee—(1) who in any workweek is employed in domestic service in a household [if the employee's compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households, and (B) is so employed for more than 8 hours in the aggregate . . . ." 29 U.S.C. § 206(f). Similarly, Section 207(*l*) mandated enhanced overtime pay for "any employee in domestic service in one or more households [who is employed] for a workweek longer than forty hours . . . ." 29 U.S.C. § 207(*l*). *See also* H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 36 (1974) ("[i]t is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service").

Congress provided exemptions from coverage, however, for domestic service workers performing two specified jobs: casual babysitting and companionship for the elderly and infirm. Section 213(a)(15) of the Act stated that the minimum wage and overtime provisions would not apply to "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide com-

panionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). The Act thus gave to the Department, in express terms, the authority to promulgate rules to define and delimit the exemptions provided by Section 213(a)(15). In addition, Congress conferred a general grant of rulemaking authority in the 1974 Amendments, stating that "the Secretary is authorized to prescribe necessary rules, regulations, and orders with respect to the amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76.

Pursuant to both of these express delegations of authority, *see* 40 Fed. Reg. 7405 (1975), the Department initiated a notice-and-comment rulemaking, which resulted in regulations subsequently published in the Code of Federal Regulations. *See* 29 C.F.R. §§ 516.34, 552.1-552.7, 552.101-552.110. The critical regulation for present purposes is Section 552.109(a), contained in Subpart B (headed "Interpretations"), which declares that "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 40 Fed. Reg. 7407. Although the original proposed regulation had not exempted workers providing companionship services "if the third party employer is a covered enterprise," 39 Fed. Reg. 35,385 (1974)—based on the premise that the Amendments did not intend to exempt "previously covered domestic service employees" (*id.*)—the Department altered its course upon further consideration. Explaining the change, the Department noted that the language of the exemption in the Act did not exclude third party employees but applied "to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. 7405. The Department concluded that the final regula-

tion was "more consistent with the statutory language and prior practices concerning similarly worded exemptions." *Id.*

At the same time that the Department promulgated Section 552.109(a), it promulgated another regulation, 29 C.F.R. § 552.3, which purported to define the term "domestic service employment." That regulation, contained in Subpart A (entitled "General Regulations"), states that "[a]s used in section 13(a)(15) of the Act, the term 'domestic service employment' refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." The regulation then goes on to provide an "illustrative and not exhaustive" list of the kinds of work considered to be "domestic service employment." 40 Fed. Reg. 7405. As explained in the regulation, that work includes services by employees such as "cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use." *Id.*

Section 552.109(a) has remained in force for more than 30 years. The Department has periodically proposed eliminating the exemption for employees of third party employers, *see* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5485, 5488 (2001), but, following various periods of comment, has invariably chosen not to do so. The most recent of these efforts took place six years ago when the Department, positing "an internal inconsistency" between Section 552.109(a) and Section 552.3, sought to resolve it by limiting the exemption to companions employed by the person receiving care or their families. *See* 66 Fed. Reg. 5485-86. The Department ultimately withdrew the proposed change, however, after numerous commenters stressed the severe economic impact that would result. *See* 67 Fed. Reg. 16,668 (2002).

B. This Litigation

1. Respondent, a worker employed by petitioner Long Island Care at Home, Ltd. to provide companionship services, brought this "test case" (Pet. App. 9a) challenging the application of Section 552.109(a) to workers employed by persons or entities other than the homeowners receiving care.[1] Finding that the regulation was entitled to "strong deference" under *Chevron,* 467 U.S. at 844, *see* Pet. App. 46a, and pointing to the "explicit grant of authority to the [Department of Labor] to define and delimit Section 213(a)(15)," as well as "the fact that these regulations have been in effect for over twenty-eight years," Pet. App. 46a, the district court held that Section 552.109(a) was a legitimate exercise of the Department's authority. *See* Pet. App. 46a.

The Second Circuit reversed. Proceeding on the basis that "[b]ecause the [Fair Labor Standards Act] is a remedial act, its exemptions are to be narrowly construed," Pet. App. 10a, the court refused to accord *Chevron* deference to Section 552.109(a), deeming it "an interpretive rather than a legislative regulation." Pet. App. 26a. Although the court of appeals acknowledged that "the rule 'grants rights, imposes obligations, or produces other significant effects on private interests,' as legislative regulations do," Pet. App. 26a (quoting *White v. Shalala,* 7 F.3d 296, 303 (2d Cir. 1993)), it held that the regulation did not merit *Chevron* deference under the test set out in *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001), because the Department "did not intend to use the legislative power delegated in [29 U.S.C.] § 213(a)(15) when it promulgated § 552.109(a)." Pet. App.

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[1] Respondent also challenged the validity of 29 C.F.R. § 552.6, which defines the term "companionship services." The Second Circuit upheld Section 552.6, *see* Pet. App. 15a-22a, and it is not at issue before this Court.

26a.[2] It found that lack of intention to be "most apparent from its inclusion of the regulation under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations.'" Pet. App. 26a.[3] It thus concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a.

The Second Circuit then went on to reject the argument that Section 552.109(a) warranted deference under *Chevron* because it had been "promulgated after notice and comment . . . ." Pet. App. 27a. Although the court recognized that "*Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference," Pet. App. 27a (citing *Mead*, 533 U.S. at 230-31), it found no need to do so for a regulation that it had already classified as an "interpretive rule." Based on that characterization of Section 552.109(a), the Second Circuit dismissed the importance of the notice-and-comment procedure by saying that "the agency undertook a notice and comment procedure for an interpretive regulation despite the fact that the procedure was not required." Pet. App. 27a.[4]

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[2] The Court in *Mead* held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27.

[3] The Second Circuit found additional support in the Secretary's statement that "[t]he definitions required by section 213(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c); *see* Pet. App. 26a.

[4] The Second Circuit recognized that the Tenth Circuit, affording *Chevron* deference, had upheld the validity of Section 552.109(a). *See* Pet. App. 25a (citing *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559,

The Second Circuit also declined to give deference to Section 552.109(a) under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Addressing "Congressional purpose," the court, without reviewing any statutory language, took the view that "persons who were employed by a third party were outside the category of 'domestic service employees' and were protected by the [Act] before the 1974 amendments," Pet. App. 29a (citations omitted), and that "[i]t is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered." Pet. App. 30a. The court of appeals also placed considerable weight on what it regarded as a "stark internal inconsistency" between Section 552.3 (the regulation defining "domestic service employment") and Section 552.109(a), Pet. App. 30a, finding that "[p]lainly, under § 552.3, employees employed by third parties do not qualify for the exemption" that Section 552.109(a) grants to them. Pet. App. 30a. Finally, the court pointed to the fact that the Department had proposed eliminating the exemption for third party employees on several occasions, deeming its position "hardly . . . a model of consistency," Pet. App. 30a, and questioned both the Department's reasoning and procedural regularity in adopting Section 552.109(a) in the first place. *See* Pet. App. 30a-31a.

2. Petitioners filed a petition for certiorari. *See* Petition for A Writ of Certiorari, No. 04-1315. Submitting a brief by invitation, the United States stated, among other things, that "it would be appropriate for this Court to grant the petition for a writ of certiorari to review the [failure to extend deference to Section 552.109(a)]." U.S. Br., No. 04-1315, at 9. However, noting that the Department of Labor had recently offered "authoritative agency guidance" making

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562 (2000)). Saying that *Johnston* had been decided before *Mead*, the Second Circuit declined to follow it. *See* Pet. App. 25a.

clear that it intended "Section 552.109(a) to be an exercise of its expressly delegated legislative authority," *id.* (citing Wage and Hour Advisory Memorandum No. 2005-1), the Solicitor General recommended that the Court vacate the judgment and remand the case to the Second Circuit for consideration of the Department's position. *See* U.S. Br. at 9-10.[5] The Court then granted the petition, vacated the judgment, and remanded the case "for further consideration in light of the Department of Labor's Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005)." 126 S. Ct. 1189 (2006).

On remand, the Second Circuit adhered to its original rulings. With respect to *Chevron* deference, it again concluded, "for substantially the same reasons," that "§ 552.109(a) was not intended, at the time of its promulgation, to be a legislative rule; rather, it was meant to be an interpretive rule." Pet. App. 3a. Finding "arguments to the contrary presented in the DOL Memo" to be "not persuasive," Pet. App. 3a, it said that, even if the Department regarded Section 552.109(a) as "legally binding," Pet. App. 3a, the regulation "could have been simply intended to provide guidance to DOL employees as to how the agency planned to interpret 'domestic service employment' in the third-party employer context." Pet. App. 4a. The court of appeals also declined, once again, to give *Skidmore* deference to the regulation. While it backed away from its earlier view that Section 552.109(a) was inconsistent with congressional intent, Pet. App. 5a, it continued to rely on the purported incompatibility between Section 552.109(a) and Section 552.3, despite the Department's explanation of why the two provisions could be read harmoniously, saying that it "need not defer to an agency's interpretations of its own regulations when those regulations, like § 552.109(a) and §552.3, are unambiguous." Pet. App. 5a (citing *Christensen v.*

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[5] The Advisory Memorandum, reprinted at Pet. App. 50a-64a, also set forth guidance regarding the proper reading of Section 552.3. *See* Pet. App. 54a-63a.

Harris County, 529 U.S. 576, 588 (2000)). It thus declared Section 552.109(a) unenforceable. Pet. App. 6a.[6]

SUMMARY OF ARGUMENT

The Second Circuit has twice struck down a Department of Labor regulation that exempts third party employees providing "companionship services" from the wage and hour provisions of the Fair Labor Standards Act. *See* 29 C.F.R. § 552.109(a); 29 U.S.C. § 213(a)(15) (granting "companionship services" exemption). Although the Department promulgated the regulation pursuant to two explicit grants of rulemaking authority and after notice-and-comment rulemaking, the Second Circuit held, *first*, that the regulation was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and, *second*, that it was not "persuasive." Both rulings are incorrect.

I

The Court has held that administrative agencies charged with implementing a federal statute have authority to "mak[e] rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (internal quotation marks omitted). Thus, when Congress has delegated rulemaking authority to an agency, a federal court must recognize that Congress intended any statutory ambiguity to be "resolved, first and foremost, by the agency," *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), and it may not "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of [the] agency." *Chevron*, 467 U.S. at 844. Not all agency actions, however, merit this familiar *Chevron* deference. *See, e.g.*,

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[6] As it had done after its initial decision, the Second Circuit stayed the mandate pending the filing of a Petition for a Writ of Certiorari in this Court. *See* Pet. App. 49a. That stay remains in effect.

Christensen v. Harris County, 529 U.S. 576, 587 (2000). To distinguish those that do from those that do not, this Court has set forth a two-part test, declaring that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

There is no real dispute in this case that Congress delegated authority to the Department to make regulations "carrying the force of law." In establishing an exemption for workers that provide "companionship services," 29 U.S.C. § 213(a)(15), Congress expressly declared that the terms of the exemption provision should be "defined and delimited by regulations of the Secretary," *id.*, a delegation that conveys "broad authority." *Auer v. Robbins*, 519 U.S. 452, 456 (1997). In addition, Congress set forth a general grant of rulemaking power, saying that "the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with respect to amendments made by this Act." 1974 Amendments, § 29(b), 88 Stat. 76 (1974). This Court has frequently recognized that regulations promulgated under similar grants should receive *Chevron* deference. *See, e.g., Barnhart v. Walton*, 535 U.S. 212, 217 (2002).

Although the Second Circuit agreed that Congress had given the Department lawmaking authority, Pet. App. 26a, it concluded that the Department had not used it in promulgating the third party employer regulation. *Id.* But the rulemaking history demonstrates just the opposite. Most notably, the Department promulgated the third party employer regulation after full notice-and-comment rulemaking, a procedure that is required only for rules of a legislative nature. *See* 5 U.S.C. § 553(b)(A); *see also Mead*, 533 U.S. at 230 ("the overwhelming number of our cases applying *Chevron* defer-

ence have reviewed the fruits of notice-and-comment rulemaking or formal adjudication"). Furthermore, the Department expressly invoked its delegated lawmaking authority under both statutory grants, and it set out its rule in binding terms that have the look and feel of "law." Finally, it has recently affirmed, in a 2005 Advisory Memorandum, that it intended the regulation to be binding at the time of promulgation and has always treated it that way. Taken together, these Department actions are more than enough to establish lawmaking intent.

The Second Circuit's holding to the contrary largely rested upon its belief that, because the regulation was set forth in a subpart headed "Interpretations," it was not entitled to *Chevron* deference. But this Court has given *Chevron* deference to a Department regulation with an identical heading, *see Auer*, 519 U.S. at 452, and, in any event, it has frequently declared that "interpretations" may receive *Chevron* deference. *See, e.g., Mead*, 533 U.S. at 227; *Gonzales v. Oregon*, 126 S. Ct. 904, 914 (2006). And the Second Circuit's other reason for withholding *Chevron* deference—its belief that the Department had exercised its specific Section 213(a)(15) "define and delimit" power with respect to other regulations but not Section 552.109(a)—is not just unpersuasive on its own terms, but ignores the fact that the Department also invoked the alternate, more general grant of lawmaking power in Section 29(b) of the Amendments, which is sufficient in and of itself to support the third party employer regulation. The regulation thus merits *Chevron* deference.

II

To apply *Chevron*, a court must determine "whether the statute unambiguously forbids the [a]gency's interpretation, and, if not, whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart*, 535 U.S. at 218. Here, respondent seeks to narrow the exemption for domestic workers providing companionship services by nar-

rowing the scope of coverage for domestic workers generally, arguing that the term "employed in domestic service"—which is used in both the coverage provisions and the exemption (*see* 29 U.S.C. §§ 206(f), 207(*l*), 213(a)(15))—extends only to workers employed by the homeowner. But there is nothing in the 1974 Amendments to require that reading, and much to cast doubt on it. The terms of the coverage provisions are broadly written, *see* 29 U.S.C. § 206(f) (minimum wage); § 207(*l*) (overtime), and neither provision expressly limits coverage only to employees directly employed by the homeowner. Likewise, the terms of the "companionship services" exemption are broad ("any employee employed in domestic service"), *see* 29 U.S.C. § 213(a)(15), and make no reference to the nature of the employer.

Respondent argues that the phrase "employed in domestic service" must be interpreted to mean "employed in a household *by the household*." Br. in Opp. 21 (emphasis added). But the text of the statute points the other way. Section 213(a)(15) itself does not suggest any limiting definition, and Section 206(f), the minimum wage provision covering "[E]mployees in domestic service," speaks of workers "employed in domestic service *in a household*," not of workers employed "by the household." 29 U.S.C. § 206(f). Section 207(*l*), the overtime provision, likewise refers only to employment "in" a household. 29 U.S.C. § 207(*l*).

Respondent's efforts to rely on legislative history also fall short. Although several Senate and House Reports describe the "generally accepted meaning" of "domestic service" as referring to work "in or about a private home of the person by whom [the worker] is employed," *see, e.g.*, S. Rep. 93-690, 93rd Cong., 2d Sess. 20 (1974), those references do not reveal a plain, or even likely, intent to limit the 1974 Amendments to homeowner-employed workers. To begin with, the same Senate and House Reports treat the term "domestic service

employees" as essentially synonymous with the term "private household workers," *see id.* at 19—a term that indisputably includes employees of third parties—indicating that members of Congress using the terms were thinking about the place of work ("a private home"), not about the employer. Moreover, the reading offered by respondent would completely exclude from the Act's minimum wage and overtime provisions any employee who did not work either for the homeowner or for a business large enough to qualify as an "enterprise," *see* 29 U.S.C. §§ 206(a)(1), 207(a)(1), leaving outside those provisions all domestic workers employed by small agencies or by family members living under a different roof. Such omissions would be inconsistent with the understanding, reflected in the legislative history, that the 1974 Amendments were generally meant "to include within the coverage of the Act all employees whose vocation is domestic service." S. Rep. No. 93-690, at 20.

In striking down the third party employer regulation, the Second Circuit concluded that it was in irreconcilable conflict with another Department regulation, *see* 29 C.F.R. § 552.3, that, in the court of appeals' view, required the homeowner to be the domestic worker's employer. The Department has explained why this is not so, however, and the Second Circuit should have given deference to the Department's reading of its own regulations. *See, e.g., Stinson v. United States*, 508 U.S. 36, 45 (1993). That obligation cannot be put aside here by asserting that the regulations are "unambiguous," *see Christensen*, 529 U.S. at 588, because the very existence of a "conflict" between two regulations—at least, as the Second Circuit has chosen to read them—indicates that some kind of ambiguity exists. The Department has provided a reasonable way of resolving it, and its third party employer regulation should stand, whether or not *Chevron* deference is accorded to it.

III

The third party employer regulation has governed whether companions are entitled to minimum wages and overtime pay for more than 30 years. Although Congress has repealed many exemptions under the Fair Labor Standards Act, it has left Section 213(a)(15) undisturbed. Moreover, when the Department proposed eliminating the third party employer exemption several years ago, it withdrew the proposal, after notice and comment, because of a concern about potential adverse effects. Those potential effects remain today, and if contrary policy arguments have any basis, it is Congress and the Department that should address them.

ARGUMENT

I. THE THIRD PARTY EMPLOYER REGULATION MERITS REVIEW UNDER THE *CHEVRON* STANDARD

The Second Circuit, in holding Section 552.109(a) to be invalid, got off on the wrong foot by deciding that the regulation did not merit review under the deferential standard set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, this Court observed that "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). The Court thus declared that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," 467 U.S. 843-44, and the "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. Moreover, even if the delegation is merely "implicit," the governing principle is that "a court may not

substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

The Court has explained that this kind of judicial deference rests upon several distinct, though related, understandings. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court stated that "[w]e accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left an ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-41. *See also National Cable & Tel. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps"). The Court has also remarked that "judgments about the way the real world works . . . are precisely the kind that agencies are better equipped to make than courts," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990), adding that "practical agency expertise is one of the principal justifications behind *Chevron* deference." *Id.* at 651-52, citing *Chevron*, 467 U.S. at 865.

In recent years, the Court has indicated that some less formal agency actions may not be entitled to *Chevron* deference. *See Gonzales v. Oregon*, 126 S. Ct. 904, 916 (2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved"). Thus, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court declined to give *Chevron* deference to "an [agency] interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id.* at 587. The Court said that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manu-

als, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Id.* The following Term, the Court denied *Chevron* deference to a tariff classification ruling of the United States Customs Service, *see United States v. Mead Corp.*, 533 U.S. 218 (2001), finding "no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law," *id.* at 231-32, and no evidence that "Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these." *Id.* at 233; *see id.* (pointing out that "Customs does not generally engage in notice-and-comment practice when issuing [the classifications]"). *See also Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 477-78 (2004) (no *Chevron* deference for an internal guidance memorandum).

The Court, however, has continued to extend *Chevron* deference to more formal agency actions. *See, e.g., Brand X*, 545 U.S. at 980-81; *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002). To distinguish regulations that deserve *Chevron* deference from those that do not, therefore, the Court has set forth a two-part test. For "administrative implementation of a particular statutory provision [to qualify] for *Chevron* deference," *Mead*, 533 U.S. at 226, it first must "appear[] that Congress delegated authority to the agency generally to make rules carrying the force of law . . . ." *Id.* at 226-27. If that condition is met, the Court said, then it must be shown that "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 227. In this case, the Second Circuit found that only the first half of that test had been satisfied: *i.e.*, that Congress had expressly delegated lawmaking authority to the Department but that the Department had not relied on it in promulgating the third party employer regulation, producing nothing more than an "interpretive rule" without the force of law. As we discuss below, while the Second Circuit was clearly right about the delegation of lawmaking power from Congress, it was

equally wrong in concluding that Section 552.109(a) lacks the force of law.

A. Congress Authorized the Department to Issue Regulations with The Force of Law

It seems beyond serious question that, insofar as the boundaries of the "companionship services" exemption are concerned, Congress wanted the Department to "'enjoy primary interpretational authority.'" *Mead*, 533 U.S. at 230 n.11 (quoting Merrill & Hickman, *Chevron's Domain*, 89 Geo. L. J. 833, 872 (2001)). To start with, although Congress need not "expressly delegate[] authority or responsibility to implement a particular provision or fill a particular gap," *Mead*, 533 U.S. at 229, it did so here in unmistakable terms: Section 213(a)(15) explicitly provides that the exemption extends to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). As this Court remarked about a comparable delegation in Section 213(a)(1) of the Fair Labor Standards Act, that kind of language conveys "broad authority to 'defin[e] and delimi[t]' the scope of the exemption . . . ." *Auer v. Robbins*, 519 U.S. 452, 456 (1997); *see also Steen v. United States*, 468 F.3d 1357, 1362-63 (Fed. Cir. 2006); *Wint v. Yeutter*, 902 F.2d 76, 81 (D.C. Cir. 1990) (Ginsburg, R.B.,J.). Indeed, even the Second Circuit below acknowledged "the legislative power delegated in § 213(a)(15)." Pet. App. 26a.

This specific grant of authority to the Department is then supplemented by a second explicit grant of rulemaking authority, albeit a more general one. Thus, Section 29 of the 1974 Amendments provides that "the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." 88 Stat. 76. Although this form of delegation is less precise than

a direction to define particular statutory terms, this Court has commonly held that regulations promulgated pursuant to similar grants are entitled to *Chevron* deference. *See, e.g., Brand X*, 545 U.S. at 980-81; *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 238 (2004); *Barnhart*, 535 U.S. at 217; *see also Gonzales*, 126 S. Ct. at 916 ("In many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute"). As a result, this separate grant of authority—unmentioned by the Second Circuit—would be enough in and of itself to justify the promulgation of regulations with the force of law.

Finally, the structure and purposes of the Amendments further indicate that "Congress would expect the [Department of Labor] to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law . . . ." *Mead*, 533 U.S. at 229. The operative phrases in Section 213(a)(15)—terms such as "employed in domestic service" and "companionship services"—have no fixed and certain meaning, and it is natural that Congress, having chosen not to define them in the Act, would want the Department, with its extensive experience in application of the wage and hour laws, to give them more concrete shape. Indeed, it is particularly appropriate for Congress to draw on that kind of agency experience here: in order to implement a specific exemption from otherwise applicable statutory provisions, it is obviously necessary to weigh both the broad interests underlying the general rule and the more particular interests giving rise to the exemption. That is precisely the kind of policy-based judgment that agencies are in the best position to make. *See Brand X*, 545 U.S. at 980 (noting "difficult policy choices that agencies are better equipped to make than courts").

B. The Department, In Promulgating The Third Party Employer Regulation, Exercised Its Delegated Lawmaking Authority

1. Although the Second Circuit mistakenly thought otherwise, Pet. App. 26a-27a, the rulemaking history demonstrates that the Department promulgated Section 552.109(a) "in the exercise of [its delegated lawmaking] authority." *Mead*, 533 U.S. at 227. The Department engaged in notice-and-comment rulemaking, specifically invoked both of its express grants of lawmaking authority, and issued a rule that is set forth in the direct mandatory terms of a law. For good measure, the Department also recently affirmed that it had intended Section 552.109(a) to be binding at the time of issuance and that it has subsequently treated it that way. *See* Pet. App. 50a-64a. Whether or not any of these lawmaking indicia is sufficient by itself, taken together they offer overwhelming evidence that the Department promulgated a regulation with the force of law.

We begin with the fact that the Department chose to engage in notice-and-comment rulemaking for all of the 1975 regulations, including Section 552.109(a). Speaking to the first part of the *Mead* test, this Court has emphasized the importance of notice-and-comment rulemaking, saying that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." 533 U.S. at 230; *see also id.* at 229 (authorization of rulemaking is "a very good indicator of delegation meriting *Chevron* treatment"); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 390 (1999). Given that assumption, it is also reasonable to assume that an agency's resort to that "relatively formal administrative procedure" will show that the agency indeed meant to make law. *See*

Brand X, 545 U.S. at 1015 (Scalia, J., dissenting); *but see id.* at 1004 (Breyer, J., concurring).[7] That inference follows logically from the fact that, under the Administrative Procedure Act, an agency is generally required to follow notice-and-comment procedures only for substantive (legislative) rules, not for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

It is unsurprising, therefore, that numerous federal courts of appeals have pointed to the use of notice-and-comment rulemaking as a strong, even dispositive, indication that an agency is exercising its delegated lawmaking power. *See Whitaker v. Thompson*, 353 F.3d 947, 950 (D.C. Cir. 2004); *White v. Scibana*, 390 F.3d 997, 1000 (7th Cir. 2004); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179 (11th Cir. 2003); *Northwest Ecosystem Alliance v. United States Fish and Wildlife Service*, 2007 WL 286581 (9th Cir. 2007); *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 n.6 (1st Cir. 2005); *Koyo Seiko Co., Ltd. v. United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001). In *Whitaker*, for example, the D.C. Circuit stated that "[b]ecause we are reviewing an agency's interpretation of the statute it is entrusted to administer, and the agency reached its interpretation after a relatively formal process with public notice and comment . . . , we review under the familiar framework established by *[Chevron]*." 353 F.3d at 950. Similarly, the Federal Circuit, reviewing an agency rule, noted that the methodology set forth in the rule "was adopted after notice-and-comment rulemaking, and thus is entitled to maximum deference." *Koyo Seiko*, 258 F.3d at 1347. The First Circuit rejected an argument that a Bureau of Prisons rule was entitled to nothing more than *Skidmore* deference, *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944);

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[7] The Court has made clear that notice-and-comment rulemaking is not *necessary* for a regulation to receive *Chevron* deference. *See Barnhart*, 535 U.S. at 221-22; *Mead*, 533 U.S. at 231.

note 11 *infra*, remarking that, because the interpretation was embodied in a regulation "which was adopted pursuant to the notice-and-comment procedure of the Administrative Procedure Act," *Perez-Olivo,* 394 F.3d at 53 n.6, it was "[t]hus . . . entitled to full deference under *Chevron*." *Id.* And, recently, the Ninth Circuit has held that the use of notice-and-comment rulemaking "weighs in favor of affording *Chevron* deference." *Northwest Ecosystem*, 2007 WL 286581, at 4.

The linkage between notice and comment, on the one hand, and substantive lawmaking, on the other, reflects the fact that such procedures promote the kind of "due deliberation" appropriate to binding agency action. *See Smiley*, 517 U.S. at 741; *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion) (requirement intended to "assure fairness and mature consideration of rules of general application"). The two-way nature of the process reflects Congress's "judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S 281, 316 (1979). Unlike more informal forms of decisionmaking, therefore, the making of law through notice-and-comment procedures assures that agency judgments will be arrived at on the basis of a record developed after public participation, *see, e.g., Air Transport Ass'n of America v. Dept. of Transp.*, 900 F.2d 369, 375 (D.C. Cir. 1990), providing the foundation for the serious consideration that lawmaking should involve. *See Mead*, 533 U.S. at 230.

The Second Circuit dismissed the fact that the Department had promulgated the regulation after notice and comment, saying that "the agency undertook a notice and comment procedure for an interpretive regulation despite the fact that the procedure was not required," Pet. App. 27a, and adding that "following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what

it did; it does not alter the fact that the agency did not act pursuant to legislative authority." *Id.* But that approach gets matters backwards. Rather than looking to the notice-and-comment procedure as an indication that the Department had invoked its lawmaking authority, the Second Circuit simply ignored it in deciding the critical issue—whether the regulation had the force of law or was merely "interpretive"—and then, once it finally turned to it, gave the procedure short shrift by treating it as unnecessary for what the court of appeals had already deemed an interpretive rule. This cart-before-the-horse analysis necessarily undervalues the legal force of a duly promulgated regulation because, contrary to what the Second Circuit seemed to believe, "following the notice-and-comment procedure" *does* indicate that an agency meant to "act pursuant to legislative authority." Pet. App. 27a. *See Haggar Apparel*, 526 U.S. at 390. It thus is an integral part of the inquiry into whether a rule has the force of law, not just an afterthought once the essential analysis has been completed.[8]

Although the Department's reliance on notice-and-comment rulemaking provides the most obvious evidence of its lawmaking intent, *see Mead*, 533 U.S. at 230 ("the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication"), several other factors lead to the same conclusion. First, there is the fact that the Department specifically relied on both congressional grants of rulemaking authority—the specific grant in Section 213(a)(15) and the

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[8] A rule promulgated following notice and comment, of course, may fail the *first* part of the *Mead* test. *See, e.g., Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002). An agency cannot assert authority that Congress did not delegate just by engaging in notice-and-comment rulemaking. As we have discussed, *see* pages 18-19 *supra*, the Act unmistakably grants the Department the authority to promulgate legislative rules. *See* 29 U.S.C. § 213(a)(15); 1974 Amendments, § 29(b), 88 Stat. 76.

general grant in Section 29(b) of the Amendments—in explaining its authority to promulgate the regulations. Thus, after setting forth the Table of Contents for the new regulations, which included Section 552.109(a) within Subpart B, the Department stated its authority as follows: "AUTHORITY: Section 13(a)(15) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), 88 Stat. 62; Sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 76)." 40 Fed. Reg. 7405. The natural assumption is that, having invoked these lawmaking powers, the Department meant to employ them.

Second, the character of the rule itself supports the idea that it is law, not merely an advisory opinion about what the law is or an agency statement about its policy of enforcement. Notably, it is written in terms of a law: Section 552.109(a) says unequivocally that third party employees "*are exempt* from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 29 U.S.C. § 552.109(a) (emphasis added). The regulation thus does not set forth a tentative or conditional position, or an interpretation that allows for further adjustment as a matter of agency discretion. Nor does it, as the Second Circuit hypothesized, read as though it were merely "guidance to DOL employees as to how the agency planned to interpret 'domestic service employment' in the third-party employer context." Pet. App. 4a; *see generally Northwest Ecosystem*, 2007 WL 286581, at 5 (noting absence of "evidence that [the agency regulation] has ever been treated . . . as anything other than legally binding"). To the contrary, the regulation fixes private rights and duties, *see Chrysler*, 441 U.S. at 302, as legislative rules do. By its express terms, third party employers are not required to pay, and companions employed by third parties have no right to demand, the wages and overtime pay called for under Sections 206 and 207 of the Act.

The Department's intention to bind itself and others is reflected not just in the language of the regulation, but in its subsequent treatment by the agency. For more than 30 years, Section 552.109(a) has been the governing law with respect to the rights and obligations of the workers and employers subject to its terms. And, while the Department has periodically questioned whether it should revise the rule, it has never just decided to make a change unilaterally, as it might do, say, for a matter of "guidance to DOL employees." Pet. App. 4a. Rather, it has always subjected the proposed changes to notice-and-comment rulemaking. *See* 58 Fed. Reg. 69,310, 69,312 (1993); 60 Fed. Reg. 46,798 (1995); 66 Fed. Reg. 5485, 5488 (2001). The decision to pursue that more formal approach offers further evidence that Section 552.109(a), from the beginning, was understood to carry the force of law.

Lastly, we have a recent declaration by the Department itself that, in promulgating Section 552.109(a), it intended to, and did, exercise its lawmaking power. *See* Pet. App. 50a-64a. The December 2005 Advisory Memorandum—issued after the initial Second Circuit decision in this case and directly contradicting it—stated in plain terms that "the Department considers the third party employment regulations at 29 C.F.R. § 552.109 to be authoritative and legally binding." Pet. App. 63a. To support that representation, the Department pointed to specific language in the 1975 Final Notice ("these exemptions *can be available* to such third party employers") demonstrating that "at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations—something that could be true only of a legislative rule." Pet. App. 63a-64a. It thus reiterated that "the Department has always treated the third party employment regulations as legally binding legislative rules . . . ." Pet. App. 64a.

The Second Circuit should have given these views more careful consideration than it did. *See* Pet. App. 3a-4a. Although an agency's characterization of its own actions is not conclusive, *see, e.g., Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416 (1942), various federal courts of appeals have held that agency characterizations carry at least some force, even in the typical situation where the agency is contending that its challenged action is not a legislative rule subject to notice-and-comment rulemaking. *See, e.g., American Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) ("significant deference to an agency's characterization of its own action"); *Splane v. West,* 216 F.3d 1058, 1063 (Fed. Cir. 2000) ("a factor [to] consider") (internal quotation marks omitted); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) ("relevant," though not "dispositive"); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517 (1994) ("Secretary was well within her discretion to interpret this language [in a regulation] as imposing a substantive limitation . . . ."). In our view, the characterization should be entitled to considerably greater weight when, as here, the agency has actually undertaken the process of notice-and-comment rulemaking and is asking only to have its rule treated with the deference that rules promulgated after notice and comment usually get. In that situation, unlike the more common case, extending judicial deference to an agency's view of its own actions poses no risk that the agency will be evading important procedural requirements. Furthermore, the Department's characterization here is supported by the historical evidence, *see* pages 20-25 *supra*, and it accords with the agency's application of the regulation over a long period of time. *See generally Barnhart,* 535 U.S. at 220 ("this Court will normally accord particular deference to an agency interpretation of 'longstanding' duration"). There was no good reason for the Second Circuit to treat it so dismissively.

2. All this evidence of lawmaking notwithstanding, the Second Circuit held that the Department, in promulgating Section 552.109(a), had not intended to make any law. The first ground for this holding—which was, in turn, the basis for denying *Chevron* deference—was that the Department had put the regulation "under 'Subpart B-Interpretations' as opposed to 'Subpart A-General Regulations.'" Pet. App. 26a. The court of appeals thus concluded that the Department had failed to satisfy the second part of the *Mead* standard "because, by the DOL's own account, [the regulation] was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to § 213(a)(15)." Pet. App. 26a.

The basic problem with this analysis lies in a critical underlying assumption: that an agency "interpretation" is not, and cannot be, a rule with the force of law. That is simply incorrect. Numerous regulations with the force of law "interpret" the governing statute in the sense that they supply legal content to statutory provisions that require further detail. *See Chevron,* 467 U.S. at 844 (discussing agency authority "to elucidate a specific provision of the statute by regulation"); *Central Texas Telephone Co-Op, Inc. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005) ("[t]he APA's definition of 'rule' contemplates that all types of rules, legislative and interpretive alike, may interpret 'law'"). Indeed, the Court in *Mead* acknowledged that agency interpretations can have the force of law, expressly declaring that *Chevron* deference is warranted when "the agency *interpretation* claiming deference was promulgated in the exercise of [delegated lawmaking] authority." *Mead,* 533 U.S. at 227 (emphasis added); *see also Gonzales,* 126 S. Ct. at 914 ("[A]n interpretation of an ambiguous statute may also receive substantial deference") (citing *Chevron*); *Christensen*, 529 U.S. at 587 (*Chevron* deference available for "an agency's regulation containing a reasonable interpretation of an ambiguous statute"). The question, therefore, is not whether an agency regulation "interprets" a statute, but whether the interpretation is one

"carrying the force of law." *Mead*, 533 U.S. at 227. Although the task of distinguishing between the different forms of interpretation is not unproblematic, *see Lincoln v. Vigil*, 508 U.S. 182, 196 (1993); *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987), it seems as clear as possible that a regulation invoking delegated law-making authority, resulting from the process of notice and comment, and fixing rights and obligations in concrete, non-precatory terms falls somewhere on the "lawmaking" side of the interpretive line.[9]

Seeking to bolster the contrary view, respondent argues that various courts of appeals have given only lesser *Skidmore* deference to Department of Labor "interpretations." Br. in Opp. 15 (citing cases). But it is a mistake to treat all Department of Labor interpretations as alike. For example, in the process of implementing the Fair Labor Standards Act's exemption for "bona fide executive, administrative, or professional" employees, 29 U.S.C. § 213(a)(1), the Department long ago issued a broad range of what it called "interpretations" *without* going through the notice-and-comment process. *See* 14 Fed. Reg. 7730 (1949). That kind of less formal agency guidance would commonly receive no more than *Skidmore* deference, as the cases cited by respondent demonstrate. However, where the Department has actually engaged in notice-and-comment rulemaking—as it did here and has done subsequently for at least one Section 213(a)(1) regulation (*see* discussion below)—a higher standard of judicial deference is warranted.

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[9] Even if this were not the case, and Section 552.109(a) was deemed an "interpretive rule," it still should receive *Chevron* deference. This Court has not ruled out deference for interpretive rules, saying only that they "enjoy no *Chevron* deference as a class," *Mead*, 533 U.S. at 232, and an interpretative rule issued after notice and comment would seem to be at the forefront of such rules deserving *Chevron* deference.

The decision in *Auer* reflects that distinction. *See* 519 U.S. at 457-58. There, the Court upheld a regulation promulgated under Section 213(a)(1) that, like the regulation at issue here, was located in a subpart entitled "Interpretations." In his brief in *Auer*, the Solicitor General specifically called attention to that heading, observing: "Although the 'salary basis' test (29 C.F.R. 541.118) appears in the 'interpretations' subpart (Subpart B) of Part 541, rather than the 'general regulations' subpart (Subpart A), that placement does not affect the level of deference owed to the rule." Brief of the United States, No. 95-897, at 16 n.4. The brief went on to note that "Section 541.118 was promulgated pursuant to notice and comment rulemaking in accordance with the statutory authorization in Section 13(a)(1). *See* 19 Fed. Reg. 1321-1322 (1954)." *Id.* The Court accorded the regulation full *Chevron* deference. *See* 519 U.S. at 457.[10]

Apart from the Subpart B heading, the only other indicia of "non-lawmaking" cited by the Second Circuit were a declaration in Section 552.2(c) that "[t]he definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5, and 552.6," *see* Pet. App. 26a (quoting 29 C.F.R. § 552.2(c)), and statements in the preamble that "Subpart A of 29 C.F.R. Part 552 defined and delimited [the terms from Section 213(a)(15)]" and "Subpart B set out statements of general policy and interpretation concerning the application of the . . . Act to domestic service employees." 40 Fed. Reg. 7404. In the court of appeals' view, those observations indicated that

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[10] Respondent has said that *Auer* is inapposite because the regulation "was . . . entitled to heightened deference as the agency's construction of its own regulation," Br. in Opp. 15-16 n.18, but she was focusing on a different part of the *Auer* opinion. Although the Court later addressed the agency's interpretation of its own regulation, *see* 519 U.S. at 461-63; pages 40-42 *infra*, the earlier part of the *Auer* opinion considered whether the regulation itself "reflects an unreasonable interpretation *of the statutory exemption*." 519 U.S. at 457 (emphasis added). Applying *Chevron* deference, the Court held that it did not. *See* 519 U.S. at 457-58.

the Department had exercised its Section 213(a)(15) rulemaking power only with respect to matters in the enumerated sections or in Subpart A. *See* Pet App. 3a; 26a. The short answer to this point, however, is that it would make no difference here even if it were correct. Given that the Department promulgated the regulations under two separate, and individually sufficient, grants of lawmaking power—Section 213(a)(15) and Section 29(b) of the Amendments—Section 552.109(a) can be supported, and meet the standard for *Chevron* deference, under either or both. *See* pages 18-19 *supra*. The Second Circuit never even mentioned the separate delegation of authority in Section 29(b), leaving its analysis fatally incomplete.

In any event, it seems very doubtful that the Department exhausted all of its Section 213(a)(15) authority in the provisions specified in Section 552.2(c), or even in Subpart A as a whole. Section 213(a)(15) conferred the power both to "define" and to "delimit" the terms of the exemption, and the term "delimit" has a broad meaning—"to fix or determine the limits of" (*see Webster's Third New International Dictionary* at 597 (1993))—that fits closely with what the Department did in many of the Subpart B provisions. *See, e.g.*, 29 C.F.R. §§ 101(a); 101(b); 103; 104(a); 105; 106; 109(b). Indeed, Section 552.109(a) itself is, in form and effect, a "delimiting" regulation: it sets the boundaries of the "companionship services" exemption by declaring that it covers domestic service workers employed by third parties. Given that Congress wanted the Department to delimit the terms of Section 213(a)(15), and given that the Department did in fact delimit them throughout both subparts of the 1975 regulations, it seems like overparsing for the Second Circuit nevertheless to conclude that the Department was not doing what Congress had authorized it to do.

In sum, Section 552.109(a) has all the earmarks of a regulation deserving *Chevron* deference. *See Johnston v. Volun-*

teers of America, Inc., 213 F.3d 559, 562 (10th Cir. 2000) (granting *Chevron* deference to Section 552.109(a)); *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004) (same). This Court has said that "*Chevron* itself is a good example showing when *Chevron* deference is warranted," *Mead*, 533 U.S. at 237 n.18, and, measured by that standard, Section 552.109(a) readily qualifies. The regulation not only sets out a clear unequivocal rule after notice-and-comment rulemaking, but does so in reliance on both specific and general grants of rulemaking authority, only the latter of which was given to the agency in *Chevron*. *See* 42 U.S.C. § 7601(a) (2000) (authorizing Secretary to "prescribe such regulations as are necessary to carry out his functions under this Act"). That is enough to earn the deference that *Chevron* commands.

II. THE THIRD PARTY EMPLOYER REGULATION REFLECTS A REASONABLE, INDEED PREFERABLE, READING OF THE STATUTE

A. The Statute Does Not Exclude Domestic Workers Employed By Third Parties

Under *Chevron*, a reviewing court is to decide "whether the statute unambiguously forbids the [a]gency's interpretation, and, if not, whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart*, 535 U.S. at 218. If neither is the case, then the court must "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980; *see Mead*, 533 U.S. at 229 (court may not reject agency's interpretation "simply because the agency's chosen resolution seems unwise"). Here, the Department has determined that companions employed by third parties fall within the scope of the Section 213(a)(15) exemption. Not only is that interpretation permissible under the statutory language, it would be the better interpretation even if the agency view was given only

the lesser deference contemplated by *Skidmore*, or no deference at all. *See generally Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002) (no need to decide level of deference when agency interpretation is clearly right).[11]

At the outset, it is important to identify the ground on which the debate about statutory language takes place. Although the challenge in this case is to an exemption for persons providing "companionship services," 29 U.S.C. § 213(a)(15), respondent is not asking the Court to adopt a limiting definition of that term, but rather a limiting definition of the term "employed in domestic service." Br. in Opp. 20-21. That latter term, however, does not just play a role in setting the boundaries of the *exemption*: it also serves to define the scope of affirmative *coverage* for all domestic workers (cooks, maids, nurses, housekeepers etc.) under the provisions added by the 1974 Amendments. *See* 29 U.S.C. §§ 206(f), 207(*l*). Respondent's attempt to narrow the exemption would, therefore, narrow the coverage of the Act as a whole. That fact not only makes it inappropriate to rely on the principle that exemptions should be narrowly construed, *see, e.g.*, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960),[12] but may help to explain why the Second Circuit, on

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[11] Even where *Chevron* does not apply, this Court has observed that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . , and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . . ." *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139, 140) (internal citations omitted). The Court in *Mead* suggested that, in that context, reasonable agency views are entitled to "'at least some added persuasive force,'" *id.* at 235 (quoting *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997)), or "'some weight,'" *id.* at 235 (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991)), or a "respect proportional to [their] 'power to persuade.'" *Id.* at 235 (quoting *Skidmore*, 323 U.S. at 140).

[12] Although the Second Circuit relied on that principle, Pet. App. 10a, it is inapposite where the mechanism for narrowing the exemption would be a

remand, retreated from its earlier suggestion that the statute itself cast doubt on the validity of the third party employer regulation. *See* Pet. App. 5a ("[c]onsideration of congressional intent therefore does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)").

To be sure, Congress did not announce in unequivocal terms that it intended the 1974 Amendments—the two coverage provisions for domestic employees generally, 29 U.S.C. §§ 206(f), 207(*l*), and the exemption provision for domestic employees providing companionship services, 29 U.S.C. § 213(a)(15)—to cover domestic workers employed by third parties. But the coverage provisions are written in sufficiently broad terms that they can extend to such employees, and they certainly do not "unambiguously forbid[]" that reading. *See Barnhart*, 535 U.S. at 218; *see also id.* (court must sustain permissible agency interpretation "[i]f . . . the statute is silent or ambiguous with respect to the specific issue") (internal quotation marks omitted); *Yellow Transp.*, 537 U.S. at 45 (same). Section 206(f), for example, directs that the minimum wage must be paid to "*[a]ny employee*—(1) who in any workweek is employed in domestic service in a household [if the employee's cash compensation constituted wages under Title II of the Social Security Act] or (2) who in any workweek—(A) is employed in domestic service in one or more households; and (B) is so employed for more than 8 hours in the aggregate." 29 U.S.C. § 206(f) (emphasis added). That language does not say that the homeowner must be the direct employer, and the explicit reference to employees "employed . . . in one *or more* households," *see* 29 U.S.C. § 206(f) (emphasis added), naturally reaches domestic service workers employed by third parties like employment agencies, who frequently work in several different houses. There is

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limitation on the overall coverage of the Act. A limitation on coverage would run counter to the principle that a remedial act should be construed broadly. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

also no obvious limitation to homeowner-employed employees in the language of the overtime subsection, 29 U.S.C. § 207(*l*), which declares that "[n]o employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours [without paying overtime]." *Id.* (emphasis added). Indeed, because the overtime provision contemplates a single employer for a worker in "one *or more* households," it quite strongly suggests that the section would apply to third party employers, which would be more likely than an individual homeowner to employ someone to work in more than one household.

The terms of the exemption provision, likewise, contain no identifiable exclusion for employees of third parties. The focus of the provision is not on the nature of employer, but on the type of work that the exempted employees perform: "companionship services for individuals who (because of age or infirmity) are unable to care for themselves." 29 U.S.C. § 213(a)(15). And, once again, there is nothing in Section 213(a)(15) to show that Congress intended the availability of the exemption to turn on who employed the worker: the language describing the workers subject to the exemption—"any employee employed in domestic service employment"—appears, on its face, to be broad and inclusive.

Respondent's argument for excluding workers employed by third parties ultimately rests upon a single premise: that the term "employed in domestic service," given its "ordinary meaning" (Br. in Opp. 21), refers only to workers "employed in a household *by the household.*" Br. in Opp. 21 (emphasis added). But the language of the Amendments provides little support for this reading. While Section 213(a)(15) itself sheds no real light on the question, Section 206(f), which is headed by the similar term "Employees in domestic service," provides that the minimum wage requirement will apply to workers "employed in domestic service *in a household*," 29 U.S.C. § 206(f)(1) (emphasis added), not workers "employed

in domestic service in a household *by the household*." *See also* 29 U.S.C. § 206(f)(2)(A) ("in one or more households"). The same is true for the overtime provision. *See* 29 U.S.C. § 207(*l*) ("in one or more households"). Thus, while even respondent seems to acknowledge that the phrase "in a household" most likely describes the place of work, and the phrase "by a household" would be needed to specify a particular employer, the two critical coverage provisions in the Amendments use only the former phrase, not the latter.

Largely bypassing the statutory language, respondent focuses instead on selected parts of the legislative history, Br. in Opp. 21, particularly a sentence in various House and Senate Reports saying that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person *by whom he or she is employed*." *See* S. Rep. No. 93-690, 93rd Cong., 2d Sess. 20 (1974) (emphasis added); S. Rep. No. 93-300, 93rd Cong., 1st Sess. 22 (1973); H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 35 (1974).[13] But, even leaving aside the fact that the italicized language does not appear in the statute—unlike other statutes that do contain such language, *see, e.g.*, 26 U.S.C. §§ 3121(a)(7)(A), (B) ("domestic service in the private home of an employer")—there are good reasons to doubt that it signals a congressional intent to cover only domestic workers employed by individual homeowners. The first is that, despite this supposed "generally accepted meaning," the same congressional reports treat the phrase "domestic service employees" as more or less synonymous with the phrase "private household workers," *see* S. Rep. No. 93-690, at 19; S. Rep. No. 93-300, at 21-22; H.R. Rep. No. 93-913, at 33; *see also* H.R. Rep. No. 93-232, 93rd Cong, 1st Sess. 31 (1973), a term that, as defined by the

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[13] The same language is contained in Section 552.3, the agency regulation defining "domestic service employment." 29 C.F.R. § 552.3. We discuss that regulation at pages 39-42 *infra*.

Department in reports submitted to Congress, unquestionably included domestic workers employed by persons *other than* the homeowner. *See* Department of Labor 1973 Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act at 27; Department of Labor 1974 Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act at 31-32; *see also* 119 Cong. Rec. 24,796 (statement of Sen. Dominick) (quoting the Department's definition of "private household workers" in discussing the proposal to cover domestic workers).[14] This off-hand equating of the terms suggests that members of Congress, in using them, were not thinking about the nature of the employer, but rather about the nature and location of the services to be performed (a point on which the terms are in agreement). That suggestion is reinforced by the fact that, in every instance, the discussion immediately following the "generally accepted meaning" reference is about the *place* ("in or about a private home" not a "boarding or lodging house") where domestic work is done. *See* S. Rep. 93-690, at 20; S. Rep. No. 93-300, at 22; H.R. Rep. No. 93-913, at 35.

In addition, a reading that limits the 1974 Amendments to homeowner-employed workers would leave a number of unexplained gaps in coverage, an outcome that would be hard to square with statements that, subject to the prescribed exemptions, the Amendments were meant "to include within the coverage of the Act all employees whose vocation is domestic service." S. Rep. No. 93-690, at 20; H.R. Conf. Rep. No. 93-413, 93rd Cong., 1st Sess. 27 (1973); H.R. Rep. No. 93-913, at 36. *See also* S. Rep. No. 93-690, at 18 ("all employ-

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[14] The term was defined by the Department as: "[A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence." *See* 1973 Report, at 27; 1974 Report, at 31-32.

ees in private household domestic service"); S. Rep. No. 93-300, at 20 (same). Apart from Sections 206(f) and 207(*l*), the only basis for coverage of domestic service workers in the Fair Labor Standards Act would be their employment by an "enterprise engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. §§ 206(a)(1); 207(a)(1); *see generally National League of Cities,* 426 U.S. at 837-38; *Tony and Susan Alamo Foundation,* 471 U.S. at 295 n.8. That provision is inapplicable, however, if the employer has annual gross sales that are less than the statutorily defined amount: $250,000 in 1974 (now $500,000). *See* 29 U.S.C. § 203(s)(1) (1976); 29 U.S.C. § 203(s)(1)(A)(ii). As a result, if Sections 206(f) and 207(*l*) were to apply only to homeowner-employed domestic workers, any domestic worker employed by agencies too small to qualify as an "enterprise" would fall entirely outside the Act's minimum wage and overtime protections, despite the fact that the worker was performing exactly the same kind of work (domestic service) in exactly the same place (a private home) as other domestic workers.

Taken literally, the "home of the person by whom he or she is employed" language would also exclude from the wage and hour provisions any domestic worker employed by a family member to help out another family member in the latter's home. This, too, would be an implausible omission. For example, it would make the coverage provisions of the Act inapplicable to a domestic worker who was employed by a parent to work in the house of a child, or who was employed by a child to assist in the home of an elderly parent. It is difficult to imagine that Congress deliberately wanted to make that kind of distinction, in a situation that could arise with some frequency, based on nothing more than the arbitrary fact that the homeowner directly employed the worker in one case, but not in the other.

We thus believe that the provisions of the Act—both the coverage provisions and the exemption—are best read to apply to domestic service workers employed by third parties, as well as to workers employed by the homeowner. This straightforward reading not only fits with the statutory text and the goal of raising wages for domestic workers generally, but it advances one evident purpose of the exemption: keeping the cost of "companionship services" within reach for those who need them. During debates on an earlier bill covering domestic service employees—a bill that did not contain an express exemption for "companionship services"—one opponent of coverage expressed concern that the higher costs resulting from the minimum wage and overtime provisions might force elderly people out of their homes and into institutions. *See* 118 Cong. Rec. 24,715 (1972) (statement of Sen. Taft). Later, again discussing a bill without an express exemption for "companionship services," various Senators suggested that, if forced to pay minimum wage and overtime, working people would find it difficult to afford needed companionship services for elderly relatives. *See* 119 Cong. Rec. 24,797 (statement of Sen. Dominick) (referring to letter from Hilda Poppell); *id.* at 24,797 (statement of Sen. Johnston); *id.* at 24,798 (statement of Sen. Burdick); *See also* Op. Lt. WH-368, 1975 WL 40991 (DOL Nov. 25, 1975) (noting legislative concern). It thus seems likely that, as the district court below concluded, Congress chose to include the exemption "to allow those in need of [companionship] services to be able to find such assistance at a price they can afford." Pet. App. 46a; *see also Welding*, 353 F.3d at 1217 ("Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them"). This concern about affordable companionship services, however, does not come and go depending upon whether the workers are employed directly by the homeowner or by a third party. *See* Pet. App.

46a-47a. Indeed, the need to restrain costs in the case of third party employees has only become more acute as agencies provide an increasing amount of the needed care.

Given the importance of preserving affordable services, there is nothing untoward about the possibility that the exemption would apply to companions who, prior to 1974, had been covered workers under the enterprise provision. Although the Second Circuit initially seemed troubled by that idea, *see* Pet. App. 29a-30a, the court of appeals offered no basis for thinking that Congress had ever directly addressed the issue of minimum wage and overtime for companions until it took up the subject of providing coverage for domestic employees as a class. When Congress did consider the issue, however, it ultimately concluded, apparently for the reasons just discussed, that it was appropriate to exempt workers providing companionship services from the wage and hour provisions, leaving their compensation to be set in light of local conditions. That more particularized judgment rightly takes precedence over the more general policies reflected in other parts of the Act, *see generally National Cable and Tel. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002), and Section 552.109(a) is consistent with that judgment.

B. The Department's Regulations Do Not Bar The Exemption For Third Party Employees

The Second Circuit paid little attention to the language of the Act, instead resting most of its decision to invalidate the exemption for employees of third parties on its belief that the exemption was incompatible with the Department's own regulatory definition of "domestic service employment" in Section 552.3. *See* Pet. App. 30a (emphasizing the "home of the person by whom he or she is employed" language). The Department, however, has explained at length why this reading of its regulations is incorrect. *See* Pet. App. 54a-63a. In its December 2005 Advisory Memorandum, the Department

said that neither Section 552.3 nor Section 552.101(a)—a second regulation containing similar language—was intended to address the question of who employed the employee. *See* Pet. App. 55a-57a, 62a-63a. Rather, the purpose of those sections was only to specify what kind of work fell within the scope of coverage and where the work was to be performed: that is, domestic services in a private home (as opposed to, say, a boarding house). *See* Pet. App. 58a. The Department also carefully reviewed the origin of the Section 552.3 language that concerned the Second Circuit (Pet. App. 57a-59a)—as well as the discussion in Section 552.101(a) that equates the Section 552.3 definition with the term "private household workers" (*see* pages 35-36 *supra*)—stressing that its use was not meant to exclude third party employees from the category of workers covered by the domestic service provisions of the Act. *See* Pet. App. 63a.

The Second Circuit, however, declined to give deference to the Department's reading of its own regulations, *see* Pet. App. 5a, showing again an improper disregard for agency views. This Court has long recognized that an agency's interpretation of its regulations "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945)). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Auer*, 519 U.S. at 461-63. As the Court has stated, the role of the judiciary is "not to decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512. Rather, a court must abide by any reasonable agency reading. *See id.; United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001).

To justify its lack of deference, the Second Circuit invoked the principle that a court "need not defer to an agency's interpretations of its own regulations when those regulations,

like § 552.109(a) and § 552.3, are unambiguous . . . ." Pet. App. 5a (citing *Christensen,* 529 U.S. at 588). But the court of appeals' assertion that the regulations are "unambiguous" is severely undercut by its further assertion that the same regulations are "jarringly inconsistent," Pet. App. 30a, a characterization that the court of appeals seemingly arrived at without making any proper effort to read them harmoniously. *See Jay v. Boyd,* 351 U.S. 345, 360 (1956) ("[w]e must read the body of regulations . . . so as to give effect, if possible, to all of its provisions"). Rather than construing the regulations together, the court of appeals chose instead to read Section 552.3 by itself and then, having ascertained its "unambiguous" meaning, decided that Section 552.3 prohibited the exemption granted by Section 552.109(a). As a result, the Second Circuit wound up attributing to the Department the highly improbable intention of, on the one hand, declaring in Section 552.3 that third party employees were ineligible for the "companionship services" exemption (by saying that they were not engaged in "domestic service employment") and then, on the other hand, simultaneously announcing in Section 552.109(a) that they were exempt anyway. Any reading that leads to such a bizarre outcome is itself proof that the regulations require a more coherent construction.

The Department has now provided a reasonable way to read the body of regulations as a whole, treating Section 552.109(a), but not Sections 552.3 and 552.101(a), as addressing the identity of the employer. *See* Pet. App. 62a-63a. By way of contrast, the reading offered by the Second Circuit and respondent puts the regulations into hopeless conflict, a state of affairs that the court of appeals could resolve only by invalidating one or the other. We actually think that, were the issue properly one for the courts to decide in the first instance, it would be more consistent with the Act to invalidate any parts of Sections 552.3 and 552.101(a) that might restrict the term "employed in domestic service" to workers employed by the homeowner, than it would be to invalidate

Section 552.109(a) in its entirely. *See* pages 32-39 *supra*. But, in any case, the issue is not one for the courts to decide in the first instance: the Department has given its own reasonable construction and, under traditional principles of deference, that is enough. *See Stinson*, 508 U.S. at 45; *Martin*, 499 U.S. at 150-51.[15]

In sum, we believe that, under any standard of deference—or without any deference at all—the Act is properly read, *first*, to cover all employees, including third party employees, that provide domestic services and, *second*, to exempt the subcategory of those employees that provide companionship services. If the *Chevron* standard is applied, as it should be, the validity of Section 552.109(a) is clearer still: nothing in the Act "unambiguously forecloses the agency's interpretation," *Brand X*, 545 U.S. at 983, and that interpretation, taken on its own terms, is entirely reasonable. The Second Circuit was wrong to strike it down.

III. POLICY ARGUMENTS AGAINST THE THIRD PARTY EMPLOYER EXEMPTION SHOULD BE DIRECTED TO THE DEPARTMENT OR TO CONGRESS

Congress has had many opportunities to eliminate the exemption provided by Section 552.109(a), but it has not done so. This lack of activity by Congress stands in marked contrast to its treatment of other exemptions granted under

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[15] The Department did not forfeit its right to deference simply because it has proposed limiting the exemption. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986); *cf.* Pet. App. 30a-31a; 5a. As the Court noted in *Schor*, "it would be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, to tax an agency with 'inconsistency' whenever it circulates a proposal that it has not firmly decided to put into effect and that it subsequently reconsiders in response to public comment." *Id.* Indeed, deference to an agency interpretation is often required even when a *court* has given the statute an "inconsistent" interpretation. *See Brand X*, 545 U.S. at 982-86.

Section 213, nearly a dozen of which have been repealed over the years. *See* 29 U.S.C. §§ 213(a)(2), (4), (9), (11), (13) and (14); 213(b)(4), (7), (8), (22) and (23).

The Department likewise has left the third party employer exemption unchanged. Ever since promulgation of the regulation in 1975, the operative rule has been that employers of workers providing companionship services are not required to pay the minimum wage or time-and-a-half for overtime, regardless of whether the employer is the homeowner or a third party such as a family member or an independent agency. Indeed, the exemption for employees of third parties has become so firmly established that, when the Department recently proposed eliminating it, it decided to pull back because of concerns about the potential adverse economic effects. *See* 67 Fed. Reg. 16,668 (2002). Thus, in its final notice, after referring to its former belief that "there would be little economic impact on affected entities if such workers were not exempt from FLSA's minimum wage and overtime pay requirements," *id.*, the Department stated that "numerous commenters on the proposed rule, including multiple government agencies such as the Small Business Administration and the Department of Health and Human Services, seriously called into question the Department's conclusion that there would be little economic impact." *Id.*[16]

The potential adverse effects remain serious today. By all accounts, third-party employers, if made subject to the wage and hour laws, simply cannot absorb the increased costs directly, especially the burden of time-and-a-half overtime obligations. Unless providers can pass on the costs, therefore, their clients will face a sharp drop in the continuity and

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[16] While respondent has recently cited material from the notice of that proposed rulemaking saying that elimination of Section 552.109(a) would not be particularly costly, Br. in Opp. 7, she nowhere acknowledged that the Department revised its opinion after reviewing numerous critical comments, including those from other federal agencies.

stability of their care, with more caregivers being required in order to provide the same or fewer services. Given the highly personal nature of companionship services, "clients often are very unwilling to enter into such a relationship with more than one or two such individuals." Pet. App. 100a (Declaration of Susan Choi-Hausman). Moreover, a shifting array of personal caregivers "assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being." Pet. App. 86a (Declaration of Maryann Osborne). This problem is likely to get worse as the number of elderly needing care continues to grow.[17]

Respondent disputes the idea that the financial burden might fall on employers, saying that they can just shift the costs to someone else. *See* Br. in Opp. 6 (home care "heavily subsidized by federal and state governments under Medicaid and other programs"). But even if prompt reimbursement of higher costs were available—which it is not, *see* National Ass'n for Home Care & Hospice, Inc. Am. Br. in Support of Petition 7-9; New York State Assoc. of Health Care Providers Am. Br. in Support of Petition 4—it is too simple just to envision government treasuries as an inexhaustible source of funds. Funding for companionship services necessarily must compete with funding for other worthwhile causes, and legislative bodies can be expected to resist any sudden sharp increases in cost. Indeed, the United States already has expressed its concern about the adverse effect of the initial Second Circuit decision on federal payments under Medicare and Medicaid. *See* U.S. Br. No. 04-1315, at 16.

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[17] Trying to minimize the potential effect of overtime payments in one State, respondent says that New York Medicaid regulations limit personal care services to 28 hours a week "absent unusual circumstances." Br. in Opp. 8. But those "unusual circumstances" are, in fact, quite usual, including situations in which "assistance by informal caregivers is unavailable, withdrawn, reduced, or unacceptable to the patient." 18 NYCRR Section 505.14(a)(6)(ii)(1)(iii). In such cases, patients can, and often do, receive up to continuous round-the-clock care.

Respondent also advances various policy arguments, saying, for example, that higher wages will induce more workers to provide companionship services. *See* Br. in Opp. 8-9. But, if those arguments have force, the Department is free to engage in new rulemaking proceedings to consider them. And Congress, of course, may always review the current need for the exemption, an inquiry that would allow Congress at the same time to address the potential financial impact on Medicare and Medicaid if the exemption were eliminated. With their greater perspective, those branches are ultimately better situated than the federal courts to make any changes that are needed.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUMMARY OF THE ARGUMENT

I. This Court should affirm the decision of the Second Circuit without reaching the first question concerning *Chevron* deference because 29 C.F.R. § 552.109(a) (the "third-party regulation") is contrary to the language in the "companionship exemption" to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a)(15), contrary to congressional intent, and contrary to a Department of Labor ("DOL") regulation, 29 C.F.R. § 552.3, entitled to greater deference. The Second Circuit's construction of the companionship exemption not to strip employees of third-party business firms of the Act's minimum wage and overtime protections is the only one that (1) gives meaning to all the words in the statutory exemption; (2) is consistent with congressional intent in the 1974 FLSA amendments to expand and in no way to contract the coverage of the FLSA as well as to accommodate the special needs of private household employers who were the exclusive focus of congressional debate; and (3) is consistent with DOL's own definition in § 552.3 of the term "domestic service employment" as used exclusively in the statutory exemption – a definition promulgated pursuant to the express congressional delegation of authority to "define[] and delimit[]" the terms of the exemption.

A. The companionship exemption encompasses only employees who are "employed in domestic service employment to provide companionship . . . .," 29 U.S.C. § 215(a)(13), and this language encompasses only companions employed directly by private household employers. The 1974 amendments extended the Act to all employees "employed in domestic service," but exempted only employees "employed in domestic service *employment*" to provide babysitting or companionship services. 29 U.S.C. §§ 206(f), 207(l), 213(a)(15) (emphasis added). There is a material distinction between the terms "domestic service" and "domestic service employment" – a distinction wholly overlooked by Petitioners. The former term is broader, encompassing domestic work performed in a household irrespective of the identity of the employer while the latter term is narrower, additionally requiring an employment

relationship between the domestic employee and the private household. The third-party regulation ignores the significance of the word "employment" as distinct from the word "service," rendering the word "employment" superfluous. In order to avoid this redundancy, the word "employment" must be given its primary dictionary definition, referring to an employment relationship – thus, the phrase "domestic service employment" means employment by the household. This is precisely the definition provided by DOL in § 552.3 – "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." This construction is consistent with subsequent congressional use of the same phrase in the closely related Social Security Act. It avoids the result, clearly not intended by Congress, of exempting companions who were already protected by the FLSA prior to the 1974 extension of coverage because they were employed by covered enterprises. Finally, it does not create the gap in coverage suggested by Petitioners.

The legislative context in which Congress adopted the companionship exemption also illuminates its meaning, confirming congressional intent to exempt only companions employed directly by private households. First, for over a decade prior to the amendments, the FLSA covered companions and other domestics employed by third-party firms qualifying as enterprises engaged in commerce. And, notably, throughout congressional discussions of the amendments the Committees and individual members of Congress repeatedly stated that they intended to expand the FLSA's coverage of domestics; nowhere did they express any intent to contract existing coverage. In other words, Congress did not intend the limitation on the extension of coverage of domestics to exceed the scope of the extension. Second, the only concerns expressed in Congress about the extension of the Act's coverage of domestics related exclusively to domestics employed directly by private households. Third, in response to these express concerns for private household employers, Congress created a limited set of

special provisions applicable only to employees employed by households, including the companionship exemption, as it had earlier done in the Social Security Act. Indeed, the Committees and members of Congress cited the Social Security Act as a model, incorporating one of its accommodations of household employers by reference into the amended FLSA. Finally, the Senate, House, and Conference Committee Reports all explained that household employers could be accommodated through the companionship exemption (and the paired exemption of babysitters) because Congress did not expect provision of companionship (or babysitting) to be a regular source of support for companions employed by households.

B. Whatever degree of deference is due the third-party regulation, greater deference is due § 552.3, which DOL expressly adopted pursuant to its delegated law-making function – to "define[] and delimit[]" the terms of the companionship exemption. Congress intended that the regulations containing these definitions and actually specifying the details of the legislation would have the "force of law." Thus, § 552.3 is entitled to greater deference than the third-party regulation promulgated pursuant to the general grant of rule-making authority in the amendments. Consistent with both the language of the exemption and the legislative context, § 552.3 provides, "As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." DOL's effort to reconcile the two regulations impermissibly ignores the unambiguous § 552.3 requirement of employment by the private household – the words "home . . . of the person by whom he or she is employed" – and is furthermore inconsistent with DOL's contemporaneous intent in promulgating and subsequent construction of § 552.3.

II. The Second Circuit properly declined to accord the third-party regulation deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), pursuant to the second prong of the test established in *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001). The Second Circuit was correct because DOL expressly and intentionally did not adopt the regulation pursuant to its delegated authority to adopt rules "carrying the force of law." To the contrary, DOL stated in its regulations, 29 C.F.R. § 552.2(c), as well as in the notice of proposed rule-making, 39 Fed. Reg. 35382 (1974), that the third-party regulation was not among those that "defined and delimited" the statutory terms but rather was a "statement of policy and interpretation." At the time it promulgated and so classified the regulation, DOL certainly knew fully the implications of such classification for judicial deference. DOL's attempt retroactively to reclassify the regulation should be accorded little weight in relation to the express, contemporaneous classification and is unpersuasive.

According the third-party regulation the deference it is due under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Second Circuit properly declined to follow the regulation because (1) the regulation is inconsistent with the exemption's text; (2) the regulation is inconsistent with congressional intent; (3) the regulation is inconsistent with DOL's own § 552.3 definition of "domestic service employment" and its reiteration in 29 C.F.R. § 552.101(a); (4) the regulation is inconsistent with the regulation governing babysitters whom Congress paired with companions in the exemption; (5) the regulation has been twice recognized by DOL as inconsistent with congressional intent (when DOL proposed the original 1974 regulation and a revised regulation in 2001) and on neither occasion did DOL repudiate or in any way undermine its own finding of inconsistency; and (6) the regulation is inconsistent with this Court's mandate that DOL narrowly construe the FLSA's exemptions.

ARGUMENT

I. THIS COURT SHOULD AFFIRM WITHOUT DECIDING WHETHER THE THIRD-PARTY REGULATION IS ENTITLED TO *CHEVRON* DEFERENCE

A. The Third-Party Regulation Is Inconsistent With Congressional Intent To Exempt Only Companions Employed Directly By Private Households

In this case, there is "no need to choose between *Skidmore* and *Chevron* . . . because the [agency] is clearly wrong." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004). "[R]egular interpretive methods leave no serious question" concerning congressional intent not to exempt companions employed by third-party firms. *Id.*

1. *The Amendments' Language Clearly Expresses Congressional Intent To Exempt Only Companions Employed Directly By Private Households*

The question of whether Congress intended the term "employed in domestic service employment to provide companionship services" to encompass companions employed by third-party firms must be answered first by examining the precise language of the 1974 amendments to the FLSA. The statutory language carving out the limitation on the extension of FLSA coverage of domestics wrought by the amendments makes clear congressional intent to exclude only babysitters and companions employed by private households.

Contrary to the assertions of Petitioners and the Solicitor General, the language in the exemption is *not* the same as the language inserted into §§ 6 and 7 of the Act extending coverage of domestics. There is a critical difference: the word "employment." The term "employment" is a qualifying and restricting term. The extension provisions broadly reach all "domestic service," but the exemption applies to only "domestic service employment." In the amended § 206, the

minimum wage requirement was extended to reach "Any employee – (1) who in any workweek is employed in *domestic service* in a household . . . ." 29 U.S.C. § 206(f)(1) (emphasis added). Similarly, the amended § 207 extended the maximum hour rule to provide, "No employer shall employ any employee in *domestic service* in one or more households . . . ." 29 U.S.C. § 207(l) (emphasis added). That language was intended to remove any doubt about whether the Act covered all employees performing any type of domestic service. In contrast, however, the exemption applies to only "any employee employed in *domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added).

If Congress had intended to exempt all employees providing companionship services in private households it would have reiterated the very same language it used to extend the Act's coverage and broadly exempted "any employee employed in domestic service to provide companionship services." Instead, Congress inserted the additional word "employment." The difference is material. Through the cumbersome phrase "any employee employed in domestic service employment," Congress qualified "service" with the additional, restrictive term "employment" and thus Congress limited the scope of the exemption based not only on the *type* of services performed by the employee (because that is specified by the words "domestic service" and "companionship services") and not only on the *location* of the services (because that would have been done by using the phrase "in a household" as in §§ 206 and 207), but rather based specifically on the *relationship of "employment."*

The meaning Congress ascribed to the qualifying word "employment" in the exemption is elucidated by influential dictionary definitions available to members of Congress in 1974. "Employment" means "[t]he act of hiring," according to *Black's Law Dictionary* 618 (4th ed. 1968), "implying a request and a contract for compensation." Thus "employment" means a direct business *relationship* between two or more parties, as

necessarily entailed in the act of "*hiring*" and the privity intrinsic to a "*contract for compensation*" rather than the work done. In *Ballantine's Law Dictionary* 400, 1164 (1969), the primary definition of "employment" is "[t]he act of employing or being employed;" in contrast, the primary definition of "service" is "[w]ork performed."[1] Similarly, *Websters' New Twentieth Century Dictionary of the English Language* 595, 1658 (2d ed. 1969) defines "employment" primarily as "the act of employing or the state of being employed," whereas "service" means "the occupation or condition of a servant." The qualifying language of the exemption, therefore, requires a specific "*employment*" relationship – an employment relationship between domestics and private households. Only giving this meaning to the phrase "domestic service employment" saves the word "employment" from being redundant with "service" and thus superfluous. "[D]omestic service employment" means precisely what DOL itself has defined it to mean in § 552.3 – not simply domestic service in a private home, but domestic service in a private home performed by an employee *employed by* the household.

Twice since 1974, Congress has again used the phrase "domestic service employment" in the closely related Social Security Act and each time the phrase encompasses only the direct employment relationship between private households and their domestic employees. In 1994, Congress amended the Social Security Act to coordinate "collection of *domestic service employment* taxes." 26 U.S.C. § 3510 (Social Security Domestic Employment Reform Act of 1994, P.L. 103-387, § 2(b)(1), 108 Stat. 4073 (Oct. 22, 1994)) (emphasis added). Congress defined "domestic service employment taxes" to mean "taxes . . . on remuneration paid for domestic service in a *private home of the employer*." 26 U.S.C. § 3510(c)(1) (emphasis added). Again in 1999, Congress clarified the wage reporting requirements "with respect to *domestic service*

[1] *Black's* offers no primary definition of "Service" but splinters the entry under headings of "Feudal Law," "Domestic Relations," "Contracts," etc. *Id.* at 1533.

employment." 42 U.S.C. § 1320b-7(a)(3) (Pub. L. 106-170, Title IV, § 405, 113 Stat. 1911 (Dec. 17, 1999)) (emphasis added). Congress specified the meaning of the term by reference to 26 U.S.C. § 3510 quoted above. Thus, Congress has twice since 1974 expressly stipulated that "domestic service employment" means the direct employment relationship between private households and their domestic employees.

This use of exactly the same phrase to refer to the relationship between private households and their domestic employees in the closely related Social Security Act is highly relevant to this Court's construction of the phrase in the FLSA. Considering similarly linked statutes in *NLRB v. Drivers Local Union No. 639*, 362 U.S. 274, 291 (1960), this Court looked to provisions of the subsequently enacted Labor Management Reporting and Disclosure Act of 1959 to interpret earlier provisions of the Taft-Hartley Act of 1947 in rejecting the National Labor Relations Board's construction of Taft-Hartley:

> To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit. We avoid the incongruous result . . . mindful of the manifest purpose of the Congress to fashion a coherent national labor policy.

See also Tiger v. Western Investment Co., 221 U.S. 286, 309 (1911) ("When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.")

Thus, the unique word "employment" in the exemption and the cumbersome phrase "employed in domestic service *employment*" must be construed to refer to a direct employment

relationship between private households and their domestic employees. Otherwise, "employment" would be synonymous with "service" and therefore superfluous. This Court has held that it is "'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). "[A] statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). Statutory construction must avoid treating any words in a statute "essentially as surplusage – as words of no consequence." *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994). That, however, is exactly what Petitioners propose and the third-party regulation effects. But this Court is "not at liberty to construe any statute so as to deny effect to any part of its language." *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879).

The injunction against rendering words in a statute superfluous is at its strongest here precisely because the exemption language of § 213(a)(15) contrasts with the extension language of §§ 206 and 207. "[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)). "'We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.'" *Id.* at 454 (quoting *Russello*, 464 U.S. at 23).

Construing "domestic service employment" to mean a direct employment relationship between private households and their domestic employees avoids the result clearly unintended by Congress of eliminating coverage of companions employed by enterprises engaged in commerce who were already covered

prior to the amendments' adoption. Moreover, because the phrase "employed in domestic service employment" appears only in the exemption, construing that phrase to mean a direct employment relationship between private households and their domestic employees does not lead to the gap in coverage described by Petitioners (between domestics employed by households and those employed by covered enterprises). In other words, giving meaning to every word in § 213(a)(15) is fully consistent with congressional intent and is the only construction of the language that is so consistent.[2]

2. *The Legislative Context Of The 1974 Amendments Confirms Congressional Intent To Exempt Only Companions Employed Directly By Private Households*

The plain meaning of the term "domestic service employment" in the companionship exemption is confirmed by examining the context in which Congress adopted the 1974 amendments to the FLSA.

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[2] Petitioners may argue that Respondent's "failure to make this exact argument below precludes its assertion here," but this Court should reject the contention as it did in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n. 27 (2001). Respondent argued in the Court of Appeals that "[t]he regulation is inconsistent with the plain meaning of the full text of the exemption" because "it exempts only employees '*employed in domestic service employment*,'" Brief at 24 (emphasis in original), and, for this reason, was invalid under *Chevron*. Reply Brief at 13. Thus, the argument presented above is not a new claim, or even "a new argument to support what has been [her] consistent claim" (which this Court made clear it would hear in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)), but merely a refinement of an existing argument in response to the suggestion (first advanced in DOL's December 2005 Advisory Memorandum) that Respondent's position would lead to a gap in coverage. And even if it were a new argument, "parties are not limited to the precise argument they made below," but rather, so long as they made the claim below (here that the regulation was inconsistent with Congress' intent), they can "formulat[] any argument they like[] in support of that claim here." *Id.*; *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). "Given the importance of the issue," this Court should, of course, consider Respondent's refined argument. *PGA*, 532 U.S. at 678 n. 27.

a. The Second Circuit correctly concluded, "It is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered." P.A. 30a. Indeed, there is absolutely no ambiguity about the fact that Congress did not intend the 1974 amendments in any way to *narrow* the FLSA's coverage. As DOL found in October 1974 – just six months after the amendments' adoption – "it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." 39 Fed. Reg. 35385 (1974). The express purpose of the amendments was to extend the Act's protections to domestics *not previously covered* because of uncertainty about whether they were individually engaged in interstate commerce – *i.e.*, to domestics employed by private households. Congress intended the companionship exemption not as a partial nullification of existing coverage of domestics employed by third-party enterprises but solely as a narrow limitation on the amendments' extension of coverage to domestics employed by private households.

It is important to understand that prior to the 1974 amendments the FLSA already covered domestics,[3] including companions, employed by third-party firms that met the test for enterprise coverage introduced by Congress into the Act in 1961, and expanded in 1966. *See* 29 U.S.C. §§ 206(a), 207(a)(1) (both applying to employees "employed in an enterprise engaged in commerce"), 203(r) and (s) (defining enterprise engaged in commerce).[4] Both Petitioners and the

[3] The Act did not expressly exempt any domestics prior to 1974, but it was not applied to domestics employed directly by private households because they were, as independent employees, not believed to be "engaged in commerce or in the production of goods for commerce" as required for individual, as distinct from enterprise, coverage. *See* 29 U.S.C. §§ 206(a), 207(a)(1)

[4] In 1974, an enterprise engaged in commerce included any enterprise "which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person,

Solicitor General concede this preexisting third-party coverage. Indeed, the Secretary of Labor had successfully sued several such third-party employers of domestics before the amendments. *See, e.g., Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362 (5th Cir. 1973); *Homemakers Home and Health Care Services, Inc. v. Carden*, 1974 U.S.Dist.LEXIS 9150 (M.D.Tenn. April 4, 1974), *aff'd*, 538 F.2d 98 (6th Cir. 1976). *See also* 1972 DOLWH LEXIS 19 at *2-3 (Aug. 20, 1972); Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971). Notably, DOL recognized this preexisting coverage immediately after enactment of the 1974 amendments when first considering whether Congress intended the companionship exemption to cover employees of third-party firms. "Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services are not exempt under section 13(a)(15) of the Act if the third party employer is a covered enterprise," DOL found. "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." 39 Fed. Reg. 35385 (1974).

Congress knew of this preexisting coverage of domestics employed by third parties because DOL reported to Congress in both January 1973 and 1974: "Employees of household service business[es employing domestics] are presently covered by the FLSA if the business is a part of an enterprise under Section 3(s) of the Act." DOL, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act: Economic Effects Study Submitted to Congress 1973* at 27 n. 1; *id. 1974* at 32 n. 1. Moreover, these DOL reports are cited in both the Senate Committee Reports and, as Petitioners state, were quoted during floor debate. *See* S. Rep. No. 93-300, 93d Cong., 1st Sess. 21 (July 6, 1973); S. Rep. No. 93-690, 93d Cong., 2d Sess. 19 (Feb. 22, 1974); 119 Cong. Rec. 24796 (1973).

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and which . . . is an enterprise whose annual gross volume of sales made or business done is not less than $250,000." 29 U.S.C. § 203(s)(1) (1974).

The express purpose of the amendments was to "expand the coverage of th[e] Act." H.R. Rep. No. 93-232, 93d Cong., 1st Sess. 1 (May 29, 1973). The Committee Reports comprehensively set forth the amendments' purposes to be raising the minimum wage and "extending the benefits and protections of the Act," but nowhere to be any form of *contraction* of coverage. *See, e.g*, H.R. Rep. No. 93-232 at 2, 8 ("It is the committee's intention to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as it presently practicable . . . ."); S. Rep. No. 93-300 at 1 ("to extend its protections to additional employees"), 2; S. Rep. No. 93-690 at 1; H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 1, 2 (March 15, 1974).[5] If Congress had any intent whatsoever to narrow coverage, surely it would have so indicated by qualifying its repeated characterization of the amendments as extending coverage

Thus, Congress intended the 1974 amendments to extend protection of domestics beyond previously covered employees of third-party enterprises, while qualifying only the extension by excluding one subset of the newly covered domestics – babysitters and companions directly employed by private households. The third-party regulation is inconsistent with this "symmetrical . . . scheme." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002). It does not make "sense in terms of the statute's basic objectives." *Barnhart v. Walton*, 535 U.S. 212, 219 (2002).

b. It is evident from the vigorous floor debate in both houses of Congress over the 1974 amendments[6] that the dispute

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[5] The Committee reports describe the steady extension of the Act's coverage since its adoption in 1938, *see, e.g.*, H.R. Rep. No. 93-913 at 4-9, but nowhere suggest that the proposed amendments were in any respect contrary to that historical pattern.

[6] Both the Senate and House specifically debated and voted on amendments to limit or eliminate the extension of coverage of domestics in the bills. *See* 119 Cong. Rec. 18352 (1973) (vote on Erlenborn substitute); *id.* at 24517 (vote on Dominick substitute); *id.* at 24796; 120 Cong. Rec. 5280 (1974) (vote on Dominick Amdt. No. 989).

centered on extending FLSA protection to domestics not previously covered precisely because they were employed by private households and by persons traditionally not considered to fall within the scope of the commerce power – in the words used throughout the debates, domestics employed by "housewives." Preexisting coverage of domestics employed by third-party enterprises was not contested. Neither opponents nor supporters of the amendments sought to eliminate or even narrow that preexisting coverage. No member of Congress presented any arguments to justify exempting any domestics employed by third-party firms. Their concerns did not center on either the nature of the services or their location. Rather, members of Congress focused on the identity of the employer and the distinctive employment relationship between domestics and private households.

Members of Congress made clear their understanding that the only domestic employees whose coverage was being contested were employees of private households and not third-party firms. Senator Williams, the cosponsor of the Senate bill, pointedly declared, "Compounding the workers' problems is the *lack of a third party intermediary* to whom the workers can appeal when treated unfairly. Faced with . . . a family that forces her to accept a 3-week unpaid vacation because they have decided to take a trip to Europe, the only recourse the worker has is to quit." 119 Cong. Rec. 24799 (1973) (emphasis added).[7] Congresswoman Mink stated, "It is likely that *employing households* will continue to offer the lowest possible pay as long as they are not required to do otherwise." 119 Cong. Rec. 18380 (1973) (emphasis added). Dissenting members of the Senate Committee also explained in the Committee Report that the proposed bill "extends coverage to . . . 836,000 *households employing domestics*." Sen. Rep. No. 93-300 at 115 (Minority views of Messrs. Dominick, Taft, and

[7] The statements of Senator Williams (as well as of Senator Javits and Congressman Dent cited *infra*), "as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 526-27 (1982).

Beall) (emphasis added).[8] They quoted the Secretary of Labor who explained that at issue was "[a] *household who hires* a maid" where "the housewife can substitute her labor" when "[f]ew employers in other fields can do so." *Id.* at 121 (emphasis added).

Opponents of the amendments repeatedly made three arguments against extending coverage to domestics employed by private households – arguments that centered on the "housewife" as employer and that form the background for the ultimate adoption of the companionship exemption, but that in no way contested coverage of domestics employed by third-party firms. These arguments concerned the difficulty of enforcing the law against private households, the burdens on "housewives," and the limits of the commerce power.

First, opponents argued that the extension would be unenforceable due to the irregular nature of domestic employment by private households and noncompliance by such households. Representative Quie asserted that enforcement would be difficult because "[t]he domestics are not employed just by a few wealthy people who employ them full time. Most of the domestics are working where they spend 1 day on one job and another day on another job. They probably have five or six employers they are working for." 119 Cong. Rec. 18346 (1973). Senator Dominick explained, "We have an estimated 1 million domestic employees on the minimum wage only. . . [I]f we ask the housewives to make reports on these and if we make them file on them and make sure the minimum wage is paid, we will either have the greatest breach of law or a revolt." *Id.* at

[8] Senators Dominick and Taft were the most outspoken Senate critics of the extension of the Act's coverage of domestics. They introduced several amendments intended to eliminate or limit the extension. *See* S. 1725, 93d Cong., 1st Sess. (May 7, 1973); S. 2727, 93d Cong., 1st Sess. (Nov. 19, 1973); S. 2747, 93d Cong., 1st Sess., Amdt. No. 981 (Feb. 28, 1974), Amdt. Nos. 989, 990 (March 1, 1974); 119 Cong. Rec. 24796 (1973). Senator Beall, the third dissenting member of the Committee, also favored exempting "families with incomes, say around $15,000 from the minimum wage coverage" of domestics. 119 Cong. Rec. 24385 (1973).

24508. He later asked, "Do we want to try to pass a law which is not going to be abided by the householder, either in terms of amount or in terms of reporting?" *Id.* at 24797.

Second, opponents argued that extension of the Act to domestics employed by private households would impose an intolerable burden on the "housewife" employing domestics. Their concern centered on "housewives" newly completing FLSA paperwork like a business, and thus plainly had no application to third-party enterprises whose coverage and obligation to keep records were already established. The minority on the House Committee asked, "Do we really want to subject housewives to possible criminal penalties for failure to keep the records?" H. R. Rep. 93-232 at 95 (Minority Views). The minority on the Senate Committee quoted the testimony of the Secretary of Labor to the same effect: "It may be unrealistic to expect accurate recordkeeping. Homemakers are not engaged in business in the traditional sense with experience in maintaining business records." S. Rep. No. 93-300 at 121 (Minority Views). Representative Erlenborn, the primary House opponent of extending coverage to employees of private households,[9] declared during floor debate, "This will require every housewife who employs a worker on a 1-day–week basis or even a half-day-a-week basis to keep books and records. . . . The housewife will be subject to penalties if she does not keep the records." 119 Cong. Rec. 18155 (1973). Senator Fannin agreed: "I just cannot imagine the housewife struggling with the paper work which would be required." *Id.* at 24365.

Finally, opponents argued that the commerce power did not reach private households directly employing domestics, while it was established that covered enterprises employing domestics could be regulated. As Senator Dominick asked rhetorically about the extension of the Act to cover domestic employees employed by private households, "Are we going to take the position that the Senate of the United States determines that

[9] Congressman Erlenborn introduced a substitute bill intended to eliminate the extension of coverage of domestics. 119 Cong. Rec. 18336-37 (1973).

hiring the neighbor's boy, aged 14, to mow the lawn is substantially affecting interstate commerce?" *Id.* at 24797.

In countering these objections, the amendments' supporters also focused on the "housewife" as a party to the domestic employment relationship. Conversely, however, they sought to justify extending coverage beyond domestics employed by third-party firms to the disputed employees of private households. The amendments expressly found that "employment of persons in domestic service in households affects commerce." Pub.Law 93-259, §7, 88 Stat. 62 (1974) (codified at 29 U.S.C. § 202(a)). Buttressing this finding, the Senate Committee referred to domestic employees' use of vacuum cleaners and supplies shipped in interstate commerce and to their work freeing householders to engage in commerce. *See* S. Rep. No. 93-300 at 23. But no member of Congress found it necessary to cite data about the size and interstate operation of third-party employers of domestics.

Whereas the amendments' opponents doubted that the "housewife" would comply with the FLSA and do the paperwork that third-party employers of domestics had been doing for over a decade, supporters argued to the contrary, pointing to her experience under the Social Security Act. The Senate Committee Report stated, "this committee is convinced that legislation which clearly expresses the intent of the Congress with respect to fair labor standards for domestics will be followed by voluntary compliance on the part of most housewives." S. Rep. No. 93-300 at 22. Senator Javits pointed to the fact "that housewives pay Social Security today for those workers," explaining that "almost 1 million households, some 836,000, filed Social Security returns" and that "is a very representative number of the households which have full-time domestics . . . ." 119 Cong. Rec. 24802 (1973). Countering the undue burden argument, Senator Javits stated: "We gave domestics coverage under social security and in many States they are covered by unemployment compensation. This answers the question of hardship on the housewife. She is

making out social security quarterly statements now for domestic employees and paying the social security tax so she knows what she is paying and what the domestic gets every quarter." *Id.* at 24373. Responding to the "claim[] that covering domestic workers . . . will result in harassing housewives throughout all America," Senator Javits noted "that domestic workers have been covered under several State minimum wage laws; . . . and there is no evidence whatsoever that such coverage has resulted in harassment of housewives." *Id.* at 24360. Employer "housewives" already kept many types of records, stated Congressman Dent, "Every person who employs a domestic today must keep records for social security when the facts of life are that a Sears Roebuck revolving account is 10 times the work of keeping those records for a domestic worker." *Id.* at 18160. Congressmen Chisholm put it plainly, "This may come as a shock to the Members of this House, but in most homes it is the wife who handles the family budget, and bookkeeping. . . . To suggest that women do not know how to add and subtract is an insult to women and totally contrary to all existing evidence." *Id.* at 18341.

Supporters not only countered opponents' arguments concerning the peculiarities of the employment relationship between domestics and private households, but highlighted those very peculiarities to justify extending coverage beyond protection of domestics employed by third-party firms. Supporters pointed to arbitrary treatment by private household employers, stating that domestics had "no appeal against the employer who calls suddenly in the morning or announces upon arrival, 'We won't need you after all,'" H.R. Rep. No. 93-232 at 32, and that domestics "do not usually receive standard benefits such as . . . vacation, and holidays – even when their employers go on vacation." 119 Cong. Rec. 18356 (1973). Senator Williams asserted, "In lieu of fair wages, they are often given secondhand clothing and leftover food." *Id.* at 24799.

In light of the debates over the 1974 amendments in both houses of Congress, Petitioners' suggestion at 36 that "members

of Congress . . . were not thinking about the nature of the employer, but rather about the nature and location of the services" is indisputably false. To the contrary, it is patently clear that both supporters and opponents of the amendments were concerned about the effect of extending the FLSA to domestic employees employed by private households. But what members of Congress expressed no concern about was coverage of domestics employed by enterprises, which had existed for over a decade, nor, indeed, about any coverage of domestics employed by third-party firms.[10]

c. In extending coverage to domestics employed by households previously unprotected by the FLSA, the 1974 amendments borrowed directly from the Social Security Act amendments of 1950 and 1955. Both Committee Reports and members of Congress expressly and repeatedly likened the 1974 FLSA amendments to the Social Security amendments. *See* H.R. Rpt. No. 93-232 at 12, 31-32; S. Rep. No. 93-300 at 20, 22; S. Rep. No. 93-690 at 18, 20; H.R. Rep. No. 93-913 at 33; *supra* at 17-18. Indeed, one provision of the Social Security amendments was incorporated by reference into the FLSA. *See* 29 U.S.C. § 206(f)(1).

Both the Social Security and FLSA amendments extended the protections of federal employment law to domestics directly employed by private households for the first time[11] and both

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[10] The only reference to this issue Petitioners cite is the occasional use of the term "private household workers" combined with a definition of that term to include employees of "household service business[es]" in a DOL report to Congress. But the point is that no member of Congress objected in any manner to coverage of employees of "household service business[es]." Moreover, if members were aware of the definition contained in that report they were also aware of its explanation that many employees of such business were already covered by the Act pursuant to its enterprise coverage, *supra* at 12, and they expressed no intention to narrow that preexisting coverage.

[11] As was the case under the FLSA, Congress' reluctance to cover domestics employed by households under the Social Security Act was "mainly because of the administrative difficulties which were believed to be involved in their coverage." S. Rep. No. 81-1669, 81st Cong., 2d Sess. 14 (May 17, 1950).

simultaneously accommodated the unique nature of that employment relationship in specific respects that limited the reach of only the new protections. The special treatment permitted by the Social Security amendments was the exclusion of domestics employed by households paid less than $50 a quarter,[12] the exclusion of non-monetary compensation paid to domestics employed by households, and the leeway granted household employers to round wages. 42 U.S.C. §§ 409(a)(6)(B); 409(a)(6)(A); 409(c). The special treatment permitted by the FLSA amendments was the exclusion of domestics employed by private households from the minimum wage requirement if they are paid less than $50 a quarter (by incorporating the Social Security provision) and from both the minimum wage and maximum hour provisions if they provide companionship or babysitting services. 29 U.S.C. §§ 206(f)(1), 213(a)(15). Thus, the concerns about burdening households raised in the amendment debates found their way into the framing of the companionship exemption, which accommodated the unique relationship between households and their domestic employees by recognizing both babysitting and companionship as the archetypical arrangements among "neighbors" deserving exclusion as "domestic service employment."

d. In the babysitter/companionship exemption, opponents and supporters of extending the FLSA's coverage of domestics found common ground because, while opponents maintained that all the proposed, new coverage of domestics employed by households would unduly burden "housewives," supporters did not believe that babysitters and companions employed by such "housewives" were "regular bread-winners." Both 1974 Committee Reports explain, "People who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support." H.R. Rep. No. 93-913 at 36. *See also* S. Rep. No. 93-690 at 20. Thus, a majority of both houses concluded that the amended FLSA could avoid imposing the burdens of compliance on households employing

[12] This threshold is now $1,000 in a calendar year. *See* 42 U.S.C. § 409(a)(6)(B) *and* 26 U.S.C. §3121(x).

babysitters and companions via the exemption without compromising the goals of the amendments. The express exclusion of companions was introduced into the bill by the Conference Committee in 1973 and its Report also articulates the understanding reiterated by the two 1974 Committee Reports: "The conferees believe that the people who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support." S. Rep. No. 93-358, 93d Cong., 1st Sess. 7, 27 (July 28, 1973).

These authoritative statements of legislative purpose[13] make clear that Congress understood the exemption to reach only the irregular employment characteristic of the relationship between private household employers, on the one hand, and babysitters and companions, on the other. In contrast, companions employed by third-party firms often work on a full-time, permanent basis and are often assigned to multiple households. These employees of third-part firms are the "professional domestic[s]," whom Senator Burdick stated he was "not concerned about" in discussing the scope of the exemption. 119 Cong. Rec. 24801 (1973). Unlike companions directly employed by households, whom Congress intended to exempt because they were not "regular" family bread-winners, it is the "professional" companions employed by third-party firms whom Congress intended to continue to protect because they are likely to be "regular bread-winners." Thus, the third-party regulation is not justified by the central congressional concern about burdening "housewives" and is inconsistent with all three Committee Reports' descriptions of the exemption's scope.

Petitioners, however, assert that the purpose of the exemption was to enable those needing companionship services to purchase them at an affordable price and that such a purpose is served by applying the exemption to employees of third-party

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[13] *See Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.")

firms.[14] But this asserted purpose is not based on any reliable expression of legislative intent, such as that consistently spelled out in all three Committee Reports, but rather on misreadings of four isolated remarks during the floor debates, none of which concerned employees of third-party firms and only one of which concerned the exemption at all.

The first cited comment is that of Senator Taft, but notably he was not speaking about the companionship exemption at all, but rather in favor of a proposed amendment intended generally "to strike the added coverage of the committee bill for domestic employees," which was voted down shortly after his comment. 118 Cong. Rec. 24714, 24720 (1972).

The second comments are those of Senator Dominick, who again, however, was not addressing the companionship exemption at all, but rather, like Senator Taft, was promoting an amendment "designed to . . cut out of the committee bill the additional coverage that was put in there on the so-called domestics." 119 Cong. Rec. 24796 (1973). This amendment too, like Senator Taft's, was rejected shortly after Senator Dominick's comments. *Id.* at 24802.[15] Starting with the hypothetical of the teenager "mowing your lawn," *id.* at 24796, Senator Dominick muses about members "who from time to time employ a cook, a cleaning woman, or whatever it may be, pay them in cash," and then quotes the cited letter from a woman who hired a helper to care for her elderly mother. His remarks relate in each instance solely to domestics employed directly by households and his point is that an extension of the law to such domestics "is not going to be abided by by the householder." *Id.* at 24797. In fact, it was not the expense of wages paid by householders that concerned Senator Dominick, but instead, as he explained, the burden of paper work: "That

[14] This rationale was not articulated in any manner when the regulation was adopted. *See* 40 Fed.Reg. 7404 (1975).

[15] It is important to understand that the amendment the Senator was speaking in favor of was to a bill which, according to the Senate Report, already excluded companions. *See* S. Rep. No. 93-300 at 22.

is what I am objecting to, not the amount of money to pay for domestic help. It is the recordkeeping involved." *Id.* at 24798.

The third comment is that of Senator Johnston, but he simply refers to the letter from the household employer read by Senator Dominick (in support of his proposed amendment eliminating all coverage of domestics) and then points out that the concern about the cost of domestics – whom he did not limit to companions – only applies to working people because "for those people who do not work . . . domestic service is a luxury rather than a necessity." *Id.* at 24798.[16]

The final comment – the only one pertaining to the exemption, but not to employees of third-party firms – actually supports Respondent's position. Addressing the meaning of companionship services as used in the Committee Report, Senator Burdick makes clear his conception of the exempt companion as a "neighbor." Senator Burdick explains, "I am not concerned about the professional domestic who does this as a daily living." *Id.* at 24801. Rather, his concern was for "people who might have an aged father, an aged mother, an infirm father, an infirm mother, and *a neighbor* comes in and sits with them." *Id.* (emphasis added). This neighborly companion is the antithesis of the "professional domestic" employed by a third-party firm. Rather, the "neighbor" is hired directly by the household in need to "sit" with elderly or infirm family members as a companion. Senator Burdick's concern was not with the ability of household employers to afford companionship services, but rather with the typically irregular nature of such neighborly employment and with assuring that "incidental" work, such as making lunch or throwing diapers in the washing machine, would not remove such services from the companionship exemption. *Id.* Thus, none of these four comments in any way suggests that the purpose of the

[16] Senator Dominick understood Senator Johnston to be suggesting eliminating coverage of domestics only when all household members work: "as I understand it from the Senator's theory, if there is someone in the household who is not working, then they have to pay the minimum wage for all this help they may be hiring." *Id.* at 24798.

companionship exemption was reducing the cost of services[17] or that any member of Congress sought to exempt companions employed by third-party firms. To the contrary, the comments of each of these Senators focus exclusively on household employers who are "private individuals." *Id.* at 24798.[18]

This Court's statement in *Chevron* aptly applies to the isolated and inapposite comments relied on by Petitioners: "The general remarks pointed to by respondents 'were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire . . . .'" 467 U.S. at 862.

In *Chevron*, this Court held, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The third-party regulation is contrary to clear congressional intent and thus must be rejected regardless of whether it is due *Chevron* deference.[19]

B. The Third-Party Regulation Is Contrary To 29 C.F.R. § 552.3 Which Defines The Term "Domestic Service Employment" In The Exemption And Is Therefore Entitled To Greater Deference

The Second Circuit found the third-party regulation to be "jarringly inconsistent" with 29 C.F.R. § 552.3 and the latter to

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[17] Indeed, if that was the purpose there is no reason why Congress limited the exemption to employees employed in private homes rather than extending the exemption to employees of day-care centers and nursing homes.

[18] Moreover, none of the Senators whose comments are cited were on the Conference Committee that inserted the companionship exemption into the bill. *See* S. Rep. No. 93-358 at 35.

[19] Petitioners cite Congress' inaction after promulgation of the third-party regulation but inaction is relevant only when "an agency's statutory construction has been 'fully brought to the attention of . . . Congress,' and the latter has not sought to alter that interpretation." *North Haven*, 456 U.S. at 535. Where, as is the case here, "there is no . . . evidence to suggest that Congress was even aware of the [agency] interpretive position. ' . . . we consider . . . re-enactment [which also did not occur here] to be without significance.'" *Brown v. Gardner*, 513 U.S. 115, 121 (1994).

be "entitle[d] to greater deference." P.A. 30a.[20] § 552.3 provides: "As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." This definition is repeated in slightly different words, also clearly requiring employment directly by the private household, in 29 C.F.R. § 552.101(a): "The domestic service must be performed in or about the private home of the employer . . . ."[21] Because the third-party regulation conflicts with the plain language of § 552.3, this Court need not decide if *Chevron* deference is due the third-party regulation as, whatever degree of deference it is due, greater deference is due § 552.3 because DOL promulgated § 552.3 pursuant to its delegated authority to "define[] and delimit[]" the exemption's terms.[22]

Congress possesses constitutional authority to specify the degree of deference courts should accord agency construction of statutes. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). If Congress states that an agency's construction is entitled to no deference, *Chevron*

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[20] In the 2001 proposed revisions of the third-party regulation discussed *infra* at 49, DOL agreed that "the current regulations contain an internal inconsistency." 66 Fed. Reg. 5485 (2001).

[21] § 552.101(a) states that the definition is "derived from the regulations issued under the Social Security Act (20 CFR 404.1057)." As promulgated in 1975, the reference was to 20 C.F.R. § 404.1027(j). *See* 40 Fed.Reg. 7406 (1975). That rule reiterated *three times* that the employer must be the homeowner. "*Domestic service defined.* Services of a household nature performed by an employee in or about a private home of the person by whom he is employed constitute domestic service in a private home of the employer. . . . Remuneration for the services above enumerated is not within this exclusion from wages unless performed in or about a private home of the employer. Remuneration for services not of a household nature . . . , even though performed in the employer's home, is not within this exclusion from wages." 20 C.F.R. § 404.1027(j) (1974).

[22] In fact, even if this Court holds that the same degree of deference is due both regulations, it should still follow §552.3 because it is more persuasive.

deference, or something in between, that instruction must be followed by the courts. Doing so honors *Mead*'s command to "tailor deference" to the "broad range of statutory authority." 533 U.S. at 236.[23] Often congressional intent is unclear in this regard, but a clear expression of intent is binding[24] and the 1974 amendments contain such a clear expression of intent.

Congress clearly intended DOL regulations "defin[ing] and delimit[ing]" the terms of the statutory exemption to have the force of law and to be accorded the highest degree of deference because the delegated authority to "define[] and delimit[]" is authority to fill in the details of the law. While the degree of deference Congress intended courts to afford regulations adopted pursuant to the general grant of rule-making authority may be debatable, Congress clearly intended that such regulations be accorded less deference than regulations "defin[ing] and delimit[ing]" statutory terms. In this case, it is only § 552.3 that "defined and delimited" the exemption's terms. *See* 29 C.F.R. § 552.2(c).

It is well established that regulations that "define[] and delimit[]" terms in the FLSA are entitled to greater deference

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[23] Justice Breyer has written, "Congressional intent to make agency decisions of law binding is really a question of *how much* deference Congress intended courts to pay to the agency's decisions, a matter of degree, not kind, and a matter to be considered by examining a particular statute." Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986).

[24] Again, Justice Breyer has written, "Of course, reliance on any or all of these factors as a method of determining a 'hypothetical' congressional intent on the 'deference' question can quickly be overborne by any tangible evidence of congressional intent." *Id.* at 371. Justice Scalia has agreed that "any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 517 (1989). Professor Thomas Merrill writes, "Congress has ultimate authority over the scope of the *Chevron* doctrine, and . . . the courts should attend carefully to the signals Congress sends about its interpretative wishes." Merrill & Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

than other regulations implementing or interpreting the Act. Indeed, over 60 years ago, the Second Circuit concluded, "Because of his express authority to make them, the Administrator's definitions have a greater dignity than ordinary administrative interpretations." *Fanelli v. United States Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944). And this Court has consistently granted greater deference to DOL regulations "defin[ing] and delimit[ing]" statutory terms then to DOL's other interpretations of the statute. *Compare Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944), *with Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 182 (1946), *and Skidmore*.

A contrary understanding of congressional intent would make the two grants of rule-making authority redundant. Professor Thomas Merrill, among the nation's preeminent administrative law scholars, has described the situation at issue here – "a statute that includes both general and more specific rulemaking grants that overlap" – as "[t]he most compelling example" of when the structure of a statute evidences congressional intent concerning the degree of deference owed agency rules. Merrill & Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 484 (2002). "[G]iven the overlap it is reasonable to argue that the general grant confers only housekeeping powers, while the narrower grants confer legislative powers." *Id.* at 485.

And here it is not simply that one grant is "narrower," for Congress used different words in the two grants of rulemaking authority in the 1974 amendments, and the words clearly signal its intention to confer different degrees of authority on the resulting rules. The grant of authority to "define[] and delimit[]" statutory terms is a grant of authority actually to specify the terms of the law. This Court so held in *Addison*, regarding a DOL regulation adopted pursuant to statutory authority to "define[]" the term "area of production" as then used in an FLSA exemption. 322 U.S. at 613. This Court paid special attention to "[t]he parenthetical qualification '(as defined

by the Administrator),'" comparing it to the parenthetical in the primary statutory exemptions (for executive, administrative and professional employees) – "(as such terms are defined and delimited by regulations of the Administrator)" – which is parallel to the parenthetical grant of authority in § 213(a)(15) – "(as such terms are defined and delimited by regulations of the Secretary)." *Id.* at 613 and n. 6. Based on that delegation of law-making authority, this Court concluded, "Congress left the boundary-making to the experienced and informed judgment of the Administrator. . . . [The] judgment belongs to him and not to the courts. For Congress has cast upon him the authority and the duty to define the 'area of production' . . . ." *Id.* at 614. In relation to the primary statutory exemption in § 213(a)(1), this Court recognized that "[t]he FLSA grants the Secretary broad authority to 'define and delimit' the scope of the exemption." *Auer v. Robbins*, 519 U.S. 452, 456 (1997). *Cf. Batterton v. Francis*, 432 U.S. 416, 425 (1977) ("Congress . . . expressly delegated to the Secretary the power to prescribe standards. . . . In exercising that responsibility, the Secretary adopts regulations with legislative effect.") In contrast, the general grant contained in the 1974 amendments provides ambiguously that "the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders *with regard to* the amendments made by this Act." Pub. Law 93-259, § 29(b), 88 Stat. 76 (April 8, 1974) (emphasis added).

It is for this reason that both the Petitioners and the Solicitor General erroneously assert that the third-party regulation was adopted pursuant to both grants of authority. But this assertion is refuted by the unambiguous statement in DOL's regulations themselves: "The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c). These expressly enumerated sections do not include the third-party regulation which is § 552.109(a). DOL's 1974 Notice of Proposed Rulemaking also clearly stated that it was DOL's intention "to add a new 29 CFR Part 552 defining and delimiting, *in Subpart A*, the terms [used in the amendments] . . ., and setting forth, *in Subpart B* [which

includes the third-party regulation], a statement of policy and interpretation concerning the application of the Fair Labor Standards Act to domestic service employees." 39 Fed. Reg. 35382 (1974) (emphasis added).

Both Petitioners and the Solicitor General also argue erroneously that the two regulations are not in conflict, relying on DOL's December 2005 Advisory Memorandum. But the Memorandum reconciles the regulations only by effectively deleting operative words from the definitional regulation. The Memorandum concedes that § 552.3 "could be read to exclude companions who are employed by third party employers from the scope of the exemption." P.A. 56a. But the Memorandum suggests that the plain phrase "performed by an employee in or about the private home (permanent or temporary) of the person by whom he or she is employed" should instead be read to mean "performed by an employee in or about a private home." P.A. 57a-63a. This reading simply deletes the final ten words of the regulation and is therefore obviously impermissible. Paradoxically, the Memorandum relies on the maxim that courts must read regulations to "harmonize the various parts and provisions of the entire regulation and give them effect, if possible." P.A. 56a. However, the DOL does not credit this maxim as it applies to the Act itself or to § 552.3 because the reading of § 552.3 proposed in the Memorandum renders the word "employment" in the statutory exemption superfluous (as explained *supra* at 5-7) and simply ignores the words "by whom he or she is employed" in § 552.3.[25] The Memorandum's

[25] Apparently for no purpose other than to further's Petitioners' argument that Respondent's position would lead to a gap in coverage, the Memorandum further proposes ignoring § 552.3's statement that it defines the term "domestic service employment" only "[a]s used in section 13(a)(15)." P.A. 60a n. 1. This is not only impermissible because the language is not ambiguous, but also because § 552.2(c) provides that "the definitions required by section 13(a)(15) are contained in §§ 552.3 . . . ." The coverage provisions not only do not use the term "domestic service employment," Congress did not grant DOL authority to define and delimit their terms. That § 552.3 describes services performed in "domestic service employment" other than babysitting and companionship is irrelevant because only

proposed construction of the two regulations avoids the conflict between them only by honoring the words of the third-party regulation instead of those in the Act and § 552.3. Thus, the Memorandum employs the maxim as it suits its purposes but flouts it in other respects.

The Memorandum's suggestion that the phrase "of the person by whom he or she is employed" has no purpose except to specify where the work must be performed is belied by the contentious debate in both houses of Congress concerning whether the Act should apply to domestics employed by "housewives." Who is the "housewife" haunting the floor debates if not the exemplar for Congress of the private household employer clearly referred to in the crucial § 552.3 phrase "of the *person* of whom he or she is employed?" To Congress, certainly the "person" employing the domestic mattered at least as much as the place of service. While the Memorandum rightly states that "the legislative history must be consulted" to determine the meaning of the phrase "of the person by whom he or she is employed," P.A. 57a, it proceeds to ignore that history in effectively deleting the phrase from § 552.3. In the wake of the debate over the 1974 amendments, which had as its central, if not exclusive, focus the identity of the employer, DOL was certainly aware of the import of the phrase "of the person by whom he or she is employed" when it inserted the phrase into the definition of "domestic service employment" in 1974.

Moreover, the Memorandum's curt dismissal of the phrase as "an extraneous vestige of the language's origin in the Social Security regulations," P.A. 57a, ignores two crucial legislative facts: Congress cited the Social Security Act as the only

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combined with § 552.6 defining companionship services does § 552.3 fully define the scope of the exemption. Finally, the same limiting phrase is used in §§ 552.4, .5 and .6 defining the words "babysitting services," "casual basis," and "companionship services for the aged and infirm," which, like the words "domestic service employment," are unique to § 213(a)(15). Thus, in an effort to defend its third-party regulation, DOL seeks to nullify most of the operative provisions of § 552.3.

existing model of federal regulation of the relationship between "housewives" and their domestic employees; and in both Acts Congress accommodated the distinctive nature of that domestic employment relationship in specific respects, including the FLSA's companionship exemption. *See supra* at 19-20. The Memorandum's reading of the phrase "in or about the private home . . . of the person by whom he or she is employed" in § 552.3 to have a different meaning than the virtually identical language in both the Social Security Act and its regulations, *see* 42 U.S.C. § 409(a)(6)(A), (B); 26 U.S.C. § 3121(a)(7)(A), (B); 20 C.F.R. § 404.1057(a); 26 C.F.R. § 31.3121(a)(7)-1(a)(2), is inconsistent with their intertwined origins.[26]

Finally, the Memorandum's reading of the phrase "in or about a private home . . . of the person by whom he or she is employed" to refer *solely* to the place of employment is also contradicted by the express reference to the place of employment in both §§ 206(f) and 207(l). The 1974 amendments extended the minimum wage requirement to "Any employee -- (1) who in any workweek is employed in domestic service *in a household*" or "(2) . . . *in one or more households*" and the overtime pay requirement to "any employee in domestic service *in one or more households*." 29 U.S.C. §§ 206(f), 207(l) (emphasis added). Thus, if Congress had intended the phrase

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[26] The Solicitor General's suggestion at 27 n. 7 that the words "of the employer" used in the Social Security Act and its regulations distinguish domestic service performed in a private home from that performed in a college club under 26 U.S.C. § 3121(b)(2); 42 U.S.C. § 410(a)(2); 26 C.F.R. § 31.3121(b)(2)-1(a); and 20 C.F.R. § 404.1014 is incorrect as in order to qualify for special treatment each type of employment must have three elements: (1) it must be domestic service, (2) it must be in a private home or college club, and (3) the household must be the employer or the employee must be a student at the college. The Solicitor General's effort to read the reference to the household being the employer out of the Social Security regulations (as well as § 552.3) is inconsistent with the Social Security Administration's construction. *See Social Security Handbook* §§ 916.1, 917.4 ("If you are a domestic worker employed by landlords or rental agencies to do work in or about property being rented as a private home, you are not performing work in the private home of the employer.")

"employed in domestic service employment" to refer solely to the place of employment and not also to the identity of the employer and if DOL had similarly intended the phrase "in or about a private home . . . of the person by whom he or she is employed" to refer only to location, surely both Congress and DOL would have simply used the same clear language used in §§ 206 and 207 to accomplish that purpose, but neither did.

Petitioners and the Solicitor General attempt to lean on the deference due an agency's construction of its own regulation. But such "deference is warranted only when the language of the regulation is ambiguous" or, in other words, "unless an 'alternative reading is compelled by the regulation's plain language.'" *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512(1994). Here there is no ambiguity in the words "of the person by whom he or she is employed."[27] The Memorandum does not contend those words are ambiguous[28] or in any way explain why they are ambiguous nor does it then construe the words. Rather, it proposes simply ignoring them and thereby impermissibly revising the regulation.

Moreover, as this Court has recently held, the fact that "the current interpretation runs counter to the 'intent at the time of the regulation's promulgation' is an additional reason why *Auer* deference is unwarranted." *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 907 (2006). DOL's original intent is evidenced not only by the unambiguous text of § 552.3, but also the statement in the parallel § 552.101(a) that the definition is derived from Social Security regulations which clearly apply only to domestics employed by households. *See supra* at 25 n. 21.

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[27] And even if there were any ambiguity in § 552.3, the reference to the Social Security regulation as the source of the language in the parallel § 552.101(a) eliminates it. *See supra* at 25 n. 21.

[28] Petitioners argue the regulation is ambiguous only because it conflicts with the third-party regulation. But two unambiguous regulations can conflict and that does not render either of them ambiguous.

Finally, the Memorandum's reading of § 552.3 is contradicted by at least eight DOL Opinion Letters as well as by DOL's Field Operations Handbook, all of which read the words "by whom he or she is employed" in § 552.3 to require that the household employ the companion. *See* 1999 DOLWH LEXIS 73 at * 2 (June 18, 1999); 1999 DOLWH LEXIS 59 at *1-2 (May 20, 1999); 1999 DOLWH LEXIS 23 at *1 (Feb. 26, 1999); 1999 DOLWH LEXIS 1 at *2 (Jan. 6, 1999); 1998 DOLWH LEXIS 75 at *1 (Aug. 28, 1998); 1998 DOLWH LEXIS 71 at *3-4 (Aug. 11, 1998); 1994 DOLWH LEXIS 97 at *2-3 (Nov. 30, 1994); 1986 DOLWH LEXIS 105 at *4 (Aug. 12, 1986); Wage and Hour Division, Field Operations Handbook § 11d00(c) (1994).[29] All of these Opinion Letters pointedly rest their conclusion on the crucial phrase "of the person by whom he or she is employed," as evidenced by the fact that the three most recent Opinion Letters all highlight that phrase.[30]

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[29] The Opinion Letters require that the household be at least the joint employer of the employee. They are thus inconsistent with the Memorandum's reading of § 552.3 and with the third-party regulation, which do not require any form of employment by the household. Moreover, while this Court need not reach the question, exempting a companion jointly employed by the household and a third party is inconsistent with congressional intent as explained *supra* at 5-24 as well as with § 552.3 which requires that the homeowner be "*the* person by whom [the companion] is employed" (emphasis added) not "*a* person by whom [the companion] is employed." The Handbook reads §§ 552.3 and .101 to provide that "an employee of a home cleaning service employer is not a domestic service employee." While the Solicitor General states that the Memorandum "repudiates and withdraws" all previous inconsistent statements, including that in the Handbook, the Handbook remains posted with this language intact on the DOL's web site as of the filing of this Brief.

[30] In addition, in 1993 and 1995, DOL proposed revising the third-party regulation to "make it clear that the exemptions are available only to those employees who meet the definition of 'domestic service employment' as set forth in § 552.3, which states that 'domestic service employment' means '. . . services of a household nature performed by an employee *in or about a private home (permanent or temporary) of the person by whom he or she is employed.*'" 58 Fed.Reg. 69311 (1993) (emphasis in original); 60 Fed. Reg. 46797 (1995). The proposal explained that "[t]his definition is based on the

Because § 552.3's definition of the terms of the exemption conflicts with the third-party regulation and because § 552.3 is entitled to greater deference, this Court should affirm the Second Circuit without reaching the question of how much deference is due the third-party regulation.[31]

II. THE THIRD-PARTY REGULATION IS NOT ENTITLED TO *CHEVRON* DEFERENCE

A. DOL Did Not Exercise Its Delegated Law-Making Authority In Promulgating The Third-Party Regulation

The Second Circuit's holding that the third-party regulation is not entitled to *Chevron* deference is expressly and correctly based on *Mead*. This Court held in *Mead* that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. The Second Circuit based its holding on the second prong: "*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless 'it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" P.A. 26a (quoting *Mead*, 533 U.S. at 226-27). The Second Circuit correctly held that the regulation "does not

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legislative history." 58 Fed. Reg. 69311. The proposal, like the Opinion Letters, would have required that the household be at least a joint employer of the companion. *Id.* at 69312. Neither proposal was ever withdrawn and thus DOL never explained why they were not adopted. DOL did repudiate its earlier Opinion Letters in 2002 DOLWH LEXIS 11 at *4 (Aug. 16, 2002), but it did so without *any* discussion of the statutory language, the legislative history, or the language in § 552.3.

[31] In contrast to its attempt to ignore the phrase "of the person by whom he or she is employed" in § 552.3, DOL might have authority to construe it to encompass a family-member employer living outside the home, consistent with Congress' intent not to exempt employees of third-party firms, in order to address Petitioners' concern for the severely disabled. Alternatively, the family member might act as employer in the capacity of guardian of the severely disabled householder and thus satisfy § 552.3.

qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority." P.A. 26a.

The regulatory record makes clear that DOL made a deliberate decision not to exercise its delegated authority to "make rules with force of law" in promulgating the third-party regulation. In 1975, when the regulation was promulgated, DOL was certainly aware of the distinctions (1) between rules adopted pursuant to its authority to "define[] and delimit[]" statutory terms and rules not adopted pursuant to that authority and (2) between substantive and interpretive regulations. DOL was also certainly aware of the different degrees of judicial deference that hinged on those two distinctions. Thus, DOL knowingly and intentionally (1) did not "define[] and delimit[] the statutory terms to include companions employed by third parties in pointed contrast to § 552.3 and other regulations promulgated at the same time that expressly did supply those definitions. Rather, DOL knowingly and intentionally (2) characterized the third-party regulation as "a statement of policy and interpretation" again in pointed contrast to § 552.3 and other "general regulations." DOL's simultaneous promulgation of these two sets of regulations under critically different administrative law rubrics cannot be dismissed as meaningless labeling. Rather, DOL deliberately denied the third-party regulation the "force of law" requisite to *Chevron* deference.

As explained *supra* at 26-28, the 1974 amendments vested two types of authority to adopt regulations in DOL. At that time, DOL fully understood the implications of not adopting a regulation pursuant to its authority to "define[] and delimit[]" the statutory terms but rather classifying it as an "interpretation." In fact, this Court had made those implications clear in its paired decisions in *Addison* and *Skidmore*. As explained *supra* at 27-28, in *Addison* this Court accorded binding force to a DOL regulation adopted pursuant to its statutory authority to "define[]" a term in an exemption. In *Skidmore*, by contrast, considering a DOL construction of the

Act that was not adopted pursuant to such an express delegation of law-making authority, this Court concluded, "We consider that the rulings, *interpretations* and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140 (emphasis added). *See also Mabee*, 327 U.S. at 182 (Administrator's "interpretations" entitled only to *Skidmore* deference).

The lower federal courts followed this Court's lead in the years before (and after[32]) 1974. When DOL exercised its authority to "define[] and delimit[]" statutory terms, the courts held that so long as the "regulations are reasonable, they are as binding on the courts as if they had been directly enacted by Congress." *Fanelli*, 141 F.2d at 218.[33] In contrast, when DOL acted outside its authority to "define[] and delimit[]" statutory terms and adopted interpretive regulations, the lower courts accorded them only *Skidmore* deference. In *Wirtz v. Keystone Readers Service, Inc.*, 418 F.2d 249, 257 (5th Cir. 1969), for example, the Court held, "The Secretary's interpretation [codified as a regulation], of course, is not binding on the courts, but it is entitled to careful consideration. . . ."[34]

Similarly, the distinction between legal regulations, on the one hand, and statements of policy and interpretive regulations, on the other hand, and the consequences of an agency's classification for judicial deference were both well established in 1974. The distinction is embodied in the Administrative Procedures Act of 1946, 5 U.S.C. §§ 553(b)(3)(A) and (d)(2) (exempting "interpretative rules" and "general statements of

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[32] *See infra* at 39.

[33] *See also, e.g., Helliwell v. Haberman*, 140 F.2d 833, 834 (2d Cir. 1944); *Walling v. Yeakley*, 140 F.2d 830, 832(10th Cir. 1944); *Knight v. Mantel*, 135 F.2d 514, 517 (8th Cir. 1943).

[34] *See also, e.g., Goldberg v.* Sorvas, 294 F.2d 841, 847 (3d Cir. 1961); *Futrell v. The Columbia Club, Inc.*, 338 F.Supp. 566, 571 (S.D.Ind. 1971); *Wessling v. Carroll Gas Co.*, 266 F.Supp. 795, 799 (N.D.Ia. 1967); *Goldberg v. Sullivan*, 208 F.Supp. 266, 270 (M.D.Ga. 1962).

policy" from notice and comment requirement). The Attorney General's 1947 *Manual on the Administrative Procedure Act*[35] also distinguished between "*[s]ubstantive rules* . . . issued by an agency pursuant to statutory authority and which implement the statute" and both "*[i]ntrpretative rule[s]* – rules or statements issued by an agency to advise the public of the agency's construction of the statutes . . . which it administers" and "*[g]eneral statements of policy* – statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Id.* at 39. And the *Manual* provided that only substantive "rules have the force and effect of law." *Id.*

In fact, DOL has itself since 1947 defined the term "interpretation" "to describe a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.'" 29 C.F.R. § 790.17(c). *See* 29 C.F.R. Part 790 ("Source: 12 FR 7655 (Nov. 18, 1947)"). DOL further explained, "The correctness of an interpretation of the . . . Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. . . .[S]uch interpretations provide a practical guide as to how the office representing the public interest in enforcement of the law will seek to apply it." 29 C.F.R. § 790.1(c).[36]

Justice Scalia has explained the well understood difference between legislative and interpretative rules that prevailed at the time the third-party regulation was adopted: in that pre-*Chevron* "era . . . we declined to give agency interpretations (including

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[35] Justice Scalia has described the Attorney General's *Manual* as "the Government's own most authoritative interpretation of the APA . . . which we have repeatedly given great weight." *Bowen*, 488 U.S. at 218 (Scalia, J., concurring).

[36] The Solicitor General correctly states that the definition in § 790.17(c) was adopted for the purpose of informing the public how DOL construed the term "interpretation" in the good faith defense created by the 1947 Portal-to-Portal Act, 29 U.S.C. § 259(a). Nevertheless, the definition is relevant to DOL's understanding and intention when it classified the third-party regulation as an interpretation in 1974.

interpretive regulations, as opposed to 'legislative rules') authoritative effect." *Christensen*, 529 U.S. at 589 (Scalia, J., concurring).

Thus, fully aware of and having expressly adopted the administrative law principles governing in 1974/75, including, specifically, the existing jurisprudence of deference under the FLSA, DOL (1) expressly declined to promulgate the third-party regulation pursuant to its authority to "define[] and delimit[]" the terms of the statutory exemption, *see* 29 C.F.R. § 552.2(c), 39 Fed. Reg. 35382 (1974); (2) instead designated it "a statement of policy and interpretation," *see id.*; and (3) classified it among the "Interpretations" not the "General Regulations," *see* 29 C.F.R. Part 552. The language used by DOL to describe Subpart B in 1974 – "a statement of policy and interpretation" – iterates *Mead*'s subsequent designation of "interpretations contained in policy statements" as "beyond the *Chevron* pale." 533 U.S. at 234.[37]

DOL's formal classification of its regulations, therefore, cannot be dismissed as meaningless labeling, but instead represents a knowing and deliberate decision by the agency, specifying which of its regulations were and which were not adopted pursuant to its delegated authority "to make rules carrying the force of law." DOL intended the two sets of regulations to be accorded different weights and expressly so provided in § 552.2(c) (one of the General Regulations). To

[37] In addition, the contents of the regulations in Subpart B reflect DOL's intention that they be used to guide administrative action, for example, § 552.100(c) and (d) announce what credits against the minimum wage "the Administrator will accept" for meals and lodging. Their style is also consistent with a statement of policy, containing references to the legislative history and cases, explanations of the source of regulatory language, background commentary, and tentative conclusions. *See, e.g.*, 29 C.F.R. §§ 552.100(b) (citing Senate Report); 552.101(a) (same); 552.104(a) ("The rationale for this exclusion . . . ."); 552.105(a) ("It is clear from the legislative history . . . .") ("This types of operation, however, could, depending on the particular facts, qualify . . . ."); 552.108 ("Congress made no change . . . ."). The regulations also provide for the public to petition for a revision of the general regulations, but not the interpretations. *See* 29 C.F.R. § 552.7.

accord both sets of regulations the same degree of deference would thus itself be an improper refusal to defer to the agency's regulations. The Second Circuit correctly held that "the regulation at issue . . . is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15)." P.A. 26a.

The Courts of Appeal are in complete harmony in according the DOL's "interpretations" of the primary statutory exemption (29 U.S.C. § 213(a)(1)) only *Skidmore* deference even though they too were promulgated as regulations.[38] *See Shaw v. Prentice Hall Computer Publ'g, Inc.*, 151 F.3d 640, 642 (7th Cir. 1998); *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.17 (3d Cir. 1994); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990). These cases rest on the fact, explained above, that "[t]he Secretary's regulations are promulgated pursuant to an express delegation of legislative authority" while the interpretations (even though they are codified as regulations) were not. *Newspapers of New England*, 44 F.3d at 1070. *See also New York*, 3 F.3d at 587 ("In contrast to the controlling authority given the Secretary's *legislative* rules – *i.e.*, those promulgated pursuant to an express grant of Congressional authority – the respect accorded the Secretary's *interpretive* regulations depends upon their persuasiveness.")[39]

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[38] Under § 213(a)(1), which exempts executive, professional, and administrative employees, DOL has, since 1949, promulgated regulations classified as "general regulations" and "interpretations." *See* 14 Fed. Reg. 7705 (1949); 14 Fed. Reg. 7730 (1949); 29 C.F.R. Part 541 (2004). Acting after notice and comment, DOL recently consolidated its General Regulations and Interpretations in Part 541 both into its "General Regulations," *see* 29 C.F.R. §§ 541.0 *et seq.*, in part, to "eliminate confusion regarding the appropriate level of deference to be given to the provisions." 68 Fed. Reg. 15563 (2003). Significantly, DOL has *not* taken similar action in respect to the general regulations and interpretations in Part 552.

[39] Petitioners and the Solicitor General argue that these cases are inapposite because the interpretive regulations relating to the § 213(a)(1) exemptions

Petitioners argue that in *Auer* this Court held to the contrary because it accorded *Chevron* deference to a regulation construing an exemption that was classified as an interpretation. But the degree of deference due the regulation was not at issue in *Auer*. The Court of Appeals expressly did not reach the question of the regulation's validity and did not discuss *Chevron* or the degree of deference due the regulation. *See* 65 F.3d 702, 710 n. 6 (8th Cir. 1995). None of the briefs state a question related to the degree of deference due the regulation. Brief for Petitioners, 1996 U.S.S.Ct. Briefs LEXIS 544 at *1-2; Brief for Respondents, *id.* 632 at *1-2; Brief for the United States, *id.* 647 at *1-2. Respondents, who challenged the regulation's application as arbitrary and capricious, did not make any argument addressed to the degree of deference owed. *Id.* 632 at *16-23. Moreover, the regulation at issue, 29 C.F.R. § 541.118(a) (1996), defined the term "salary basis," which was used in the general regulations not in the Act, 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996), and was thus entitled to heightened deference as the agency's construction of its own regulation as this Court explained. *Auer*, 519 U.S. at 456. Thus, this Court's statement about § 541.118 must be regarded either as *dicta* or as based on the deference due the regulation as a construction of DOL's own, definitional regulation.[40]

Petitioners' other arguments are equally unconvincing. They argue that DOL promulgated the entire set of regulations, including the third-party regulation, pursuant to both its

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were promulgated without notice and comment. But this is not the rationale of the cited cases and is incorrect. *See* 28 Fed.Reg. 7002 (1963) (proposed rules); 29 Fed.Reg. 9505 (1963) (final rules). *See also* 19 Fed.Reg. 1321 (1954) (proposed revision to one of the interpretive rules); 19 Fed.Reg. 4405 (1954) (final rule).

[40] Petitioners at 29 quote from a footnote of the Brief of the United States arguing for deference regardless of the regulation's classification as an interpretation, but fail to quote the remainder of the argument: "an agency's 'power authoritatively to interpret its own regulations is a component of [its] delegated lawmaking powers.'" 1996 U.S.S.Ct. Briefs LEXIS 647 at 31 n. 4. Thus, even assuming this Court accepted the government's argument, the basis of the deference it accorded the regulation is ambiguous.

authority under § 213(a)(15) to "define[] and delimit[]" the terms of the exemption and the general grant of rule-making authority. But while § 213(a)(15) was listed as authority for the entire set of final regulations (along with the general grant), *see* 40 Fed. Reg. 7405 (1975), DOL, in two separate statements, expressly indicated that the third-party regulation was not among those adopted pursuant to its authority to "define[] and delimit[]" the terms of the exemption. *See* 29 C.F.R. § 552.2(c); 39 Fed. Reg. 35382 (1974). Moreover, the notice does not specifically cite the authority given DOL in § 213(a)(15) to "define[] and delimit[]" the exemption's terms, but merely cites § 213(a)(15) as a whole. Obviously, "both legislative and interpretive rules frequently interpret the meaning of language in a statute" and thus cite the statute. Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 384 (1985). Thus, merely citing the exemption without referring to the authority to "define[] and delimit[]" its terms does not at all suggest that the rule was an exercise of delegated law making authority.

Petitioners also argue that the "nature of the rule" suggests it is legislative, citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). But viewed as a whole, the "Interpretations" contained in subpart B do not read like laws. *See supra* at 38 n. 37. Moreover, *Chrysler* did not involve the question of the degree of deference due agency regulations (but rather the question of whether action authorized by a regulation was "authorized by law" as that term is used in 18 U.S.C. § 1905), and *Chrysler* was decided prior to *Mead* and *Chevron*. *Chrysler* cannot stand for the categorical proposition asserted by Petitioners or it would render the subsequent *Mead* test inoperable in many cases. Finally, *Chrysler* makes clear that the bare fact "[t]hat an agency regulation is 'substantive' . . . does not by itself give it the 'force and effect of law.'" *Id.* at 302. Rather, "the exercise of quasi-legislative authority by governmental departments . . . must be rooted in a grant of such power by the Congress." *Id.* Here, the Second Circuit correctly held that DOL did not "root" its actions in such a grant of power.

Petitioners' final argument is that the Second Circuit should have deferred to the DOL's *ex post facto* characterization of the regulation in its December 2005 Advisory Memorandum.[41] But the Second Circuit correctly did not accept the Memorandum's untimely characterization for three reasons.

First, it is DOL's classification of the regulation contemporaneous with its promulgation that is relevant under *Mead*, not its *post-hoc* reclassification three decades later in the Memorandum.[42] *Mead* holds that *Chevron* deference is not appropriate "where such authority [to adopt rules with force of law] was not invoked" – *i.e.*, invoked at the time of promulgation. 533 U.S. at 237 (emphasis added). That is the determinative point under *Mead* and it cannot be altered by subsequent agency assertion. Indeed, even prior to *Mead*, scholars of administrative law stated, "When an agency has a choice to proceed legislatively or nonlegislatively, its *contemporaneous* description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose *at the time it made the choice*." Asimow, *Nonlegislative Rulemaking*, at 389 (emphasis added). In contrast, "[s]ubsequent characterization" of a regulation as legislative or interpretive should not be accorded deference. *Id.* at 390 n.40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but . . . . we are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")[43]

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[41] Petitioners do not argue that such deference is required in this regard because DOL construed the terms of its own third-party regulation in the Memorandum and, in fact, the Memorandum does not in any way do so.

[42] In fact, the Memorandum does not characterize the *promulgation* of the regulation as an exercise of DOL's delegated law-making authority, but merely states, "the Department has always treated the third party employment regulations as legally binding legislative rules." P.A. 64a.

[43] While Professor Asimow's article and *Levesque's* holding concern the APA, their logic applies equally here.

Second, in *Auer*, this Court made clear that "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack" is not entitled to deference. 519 U.S. at 462 (quoting *Bowen*, 488 U.S. at 212). That is exactly what the Memorandum is as demonstrated by the timing of its issuance. On June 6, 2005, after the original petition for a writ of certiorari was filed in this case, this Court invited the Acting Solicitor General to file a brief. On December 1, 2005, DOL issued the Memorandum.[44] On December 22, 2005, the Solicitor General filed his Brief, relying primarily on the Memorandum as grounds for remand.[45] The Memorandum is "a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack."

Third, the Advisory Memorandum is, as its title makes clear, only advisory. It states expressly that it is intended only for *internal* guidance of agency personnel: "to advise staff how to apply the Section 13(a)(15) companionship services exemption . . . ." P.A. 50a. Indeed, only staff "outside the Second Circuit" are "instructed to continue to apply the exemption" to employees of third parties. P.A. 50a. This limitation on the intended effect of the Memorandum is consistent with DOL policy which provides: "advisory interpretations announced by the Administrator [this one was

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[44] Even the vehicle of an advisory memorandum was invented to serve strategic interests in this case. DOL ordinarily provides advice through Wage and Hour Opinion Letters. *See, e.g., supra* at 12, 33. The fact that DOL rarely issues advisory memoranda is evidenced by the fact that this was the first one issued in 2005 even though it was issued on December 1. Moreover, a LEXIS search of all federal court decisions citing DOL advisory memoranda reveals only decisions citing the December 1, 2005 Memorandum.

[45] Justice Scalia's concerns are apt under these facts. "[E]ven if we allow deference to an agency view first expressed in pending litigation . . . surely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position first expressed at the certiorari stage. The United States is the most frequent, and hence the most calculating, of our litigants." *Stutson v. United States*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting).

announced by the Deputy Administrator] serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties." 29 C.F.R. § 775.1. Thus, the Memorandum expressly disclaims any influence on courts.

B. Notice and Comment Is Not Determinative

Petitioners argue that *Chevron* deference is *always* owed agency interpretations embodied in regulations adopted after notice and comment, while conceding that *Mead* held no such thing. *See Mead*, 533 U.S. at 230-31. As this Court pointed out in *Barnhart*, 535 U.S. at 222, much of the "discussion . . . [in *Mead*] would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive."

No Justice of this Court and no Court of Appeals has ever suggested that a regulation adopted after notice and comment is *always* entitled to *Chevron* deference, even when the agency clearly indicated at the time of adoption that it was not invoking its "delegate[d] general authority to make rules with force of law."[46] Surely an agency can decide to adopt an interpretation without exercising its delegated authority to "make rules with force of law" (in order, for example, to permit greater leeway for judicial construction), but do so after notice and comment.[47] In fact, this Court stated in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 390 (1999), that even if an agency used notice-and-comment rulemaking a court may hold that the regulations "were not intended to be entitled to judicial deference" based on "language to this effect in the regulations

[46] Petitioners' cite Justice Scalia's reading of *Mead* in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1015 (2005) (Scalia, J., dissenting), as holding that "some unspecified degree of formal process was required – or was at least the only safe harbor." But that statement does not suggest that notice and comment requires *Chevron* deference even when the agency expressly declines to dock in the harbor.

[47] As this Court held in *Chrysler*, 441 U.S. at 312-13, "It is within an agency's discretion to afford parties more procedure."

themselves." There is precisely such language in § 552.2(c) of the regulations here.

C. The Notice and Comment Procedure Was Defective

Even if this Court were to hold that the use of notice and comment procedure is ordinarily determinative of a regulation's status under *Chevron* (regardless of the agency's contemporaneous intention), the Second Circuit found that DOL's compliance with the APA's notice and comment requirements "was at best idiosyncratic and at worst insufficient" when it promulgated the third-party regulation. P.A. 24a. This Court has held that a defect in mandated procedures precludes deference. *Chrysler* holds that "a procedural defect in the . . . regulations [– "lack of strict compliance with the APA" –]. . . precludes courts from affording them the force and effect of law." 441 U.S. at 312. *See also Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 242 (2004) (regulation "'is binding in the courts unless procedurally defective . . . .'")

Indeed, if the regulation is legislative, as Petitioners contend, the defect in notice renders it invalid under the APA. As the D.C. Circuit held, "[w]hatever a 'logical outgrowth' of [a] proposal may include, it certainly does not include the Agency's decision to repudiate its proposed interpretation and adopt its inverse." *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C.Cir. 2005). The Second Circuit similarly held, "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986). This was the case here.[48]

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[48] The Solicitor General asserts that this argument was not timely raised in the District Court, but the issue was properly considered by the Second Circuit both because the Court has discretion to reach a purely legal issue not raised below when there is no prejudice, *see Lo Duca v. United States*, 93 F.3d 1100, 1104 (2d Cir. 1996), *cert. denied*, 519 U.S. 1007 (1996), and

On October 1, 1974, DOL published the proposed regulation providing, "Employees who are engaged in providing babysitting and companionship services and who are employed by an employer other than the families or households using such services, are not exempt under section 13(a)(15) of the Act if the third party employer is a covered enterprise." 39 Fed. Reg. 35385 (1974). DOL reasoned, "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Id.*

The notice of final rule making replaced the proposed regulation with its inverse – the current regulation. 40 Fed. Reg. 7404 (1975). DOL noted the change, but provided an explanation inconsistent with the text of the Act:

> The one major change in Part 552 is in § 552.109 which deals with 'third party employment.' This section as originally proposed would not have allowed the section 13(a)(15) . . . exemption for employees, who, although providing companionship . . . are employed by an employer or agency other than the family or household using their services. On further consideration, I have concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services.

40 Fed. Reg. 7404 (1975). This explanation neither addresses the logic of the proposal nor accurately reflects the full text of the exemption.[49] The exemption does not apply to "any

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because the issue was raised in Plaintiff's Supplemental Memorandum in Opposition to Motion for Judgment on the Pleadings (Docket No. 24) at 10-11 and Defendants filed their Supplemental Memorandum of Law (Docket No. 26) after Plaintiff's filing. Moreover, as Defendants filed *no* brief in the Court of Appeals, they and their amici are not in a position to argue waiver.

[49] Moreover, it applies equally to babysitting services which were nevertheless treated differently as explained *infra* at 48-49.

employee engaged in companionship services" as DOL suggested, but rather only to "employees *employed in domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added). As the Second Circuit found, "the DOL ignored the plain language of the statute." P.A. 31a. By leaving out the critical limiting term "domestic service employment" – DOL improperly broadened the scope of the limitation on the extension of coverage beyond the scope of the extension itself. The defective notice thus led directly to a flaw in the agency's decision-making process.[50]

In *Chevron*, this Court held that deference is due if "the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 U.S. at 865. Here, however, the decision was neither detailed nor reasoned and did not reconcile conflicting policies but rather was based on a misstatement of the statutory text. This Court has held that "the agency must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983). The "relevant data" surely includes *all* the relevant statutory text.

III. GRANTED THE DEFERENCE IT IS DUE UNDER *SKIDMORE*, THE THIRD PARTY REGULATION SHOULD NOT BE FOLLOWED

In declining to follow the third-party regulation, the Second Circuit properly considered the regulation's "power to persuade" based on its consistency with the Act's text, its "consisten[cy] with the congressional purpose," its consistency with other regulations, the "consistency of the agency's position" over time, the "thoroughness evident in its consideration," and "the validity of its reasoning." *Skidmore*,

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[50] DOL further stated, "This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions," 40 Fed. Reg. 7405, but did not specify what those were. The Solicitor General's effort to suggest what they might have been (at 19) is wholly unsuccessful as none of the provisions he cites contained parallel language relating to a type of "employment."

323 U.S. at 140; *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Batterton*, 432 U.S. at 425 n.9. We have demonstrated that the regulation is inconsistent with the text of the Act, with congressional intent, with two other DOL regulations, and with numerous DOL Opinion Letters. In addition, the regulation is inconsistent with that governing the paired exemption of babysitters, DOL has twice explained why the regulation is inconsistent with congressional intent, and the regulation defies this Court's command narrowly to construe exemptions in the FLSA.

A. The Regulation Is Inconsistent With That Governing The Paired Exemption Of Babysitters

DOL's regulations provide that babysitters employed by third-party firms are *not* included within the § 213(a)(15) exemption. 29 C.F.R. § 552.109(b). Yet the statutory exemption pairs employees employed "in domestic service employment to provide babysitting services or . . . companionship services" and the two types of domestic service employment were talked about in the same breath in Congress. In fact, Senator Williams defined companionship services by expressly likening it to babysitting. During floor debate, Senator Williams explained:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for – to watch the youngsters. 'Companion,' as we mean it, is in the same role – to be there and to watch an older person, in a sense.

119 Cong. Rec. 24801 (1973). Thereupon, Senator Burdick interjected, "In other words, an elder sitter," and Senator Williams replied, "Exactly." *Id.*

There is no basis for treating companions employed by third parties differently from babysitters employed by third

parties as the proposed regulation of 1974 recognized.[51] Thus, DOL's regulations are internally inconsistent on this point, too.

B. DOL Has Twice Persuasively Explained Why Companions Employed By Third-Party Firms Are Not Exempt

We described *supra* at 46 how the DOL explained in 1974 why exempting employees of third-party firms was inconsistent with congressional intent. Again in 2001, DOL proposed reversing the third-party regulation and again persuasively explained why the current regulation is inconsistent with congressional intent. 66 Fed. Reg. 5485, 5488 (2001). "The Department believes that Congress did not intend the 1974 amendments to change the status of workers already covered by the FLSA, but only intended to exclude casual babysitters and companions from those newly covered by the law, that is, those exclusively employed by the homeowner or family member." *Id.* at 5485. The 2001 proposal was withdrawn in 2002, *see* 67 Fed. Reg. 16668 (2002), but, as the Second Circuit explained, on grounds "that have no bearing on the . . . relevant question of what Congress intended in 1974." P.A. 28a.

Petitioners point out that a proposed regulation is not a final regulation and, even if it were, that agencies do not necessarily sacrifice deference when they alter their construction of a statute. However, when it issued the 1974 and 2001 proposals to deny the exemption to both babysitters and companions employed by third-party firms, DOL explained why that was required by the Act and congressional intent. Notably, however, neither in its final regulations in 1975 nor in the withdrawal of the proposal in 2002 did DOL repudiate its earlier rationales or otherwise provide an adequate explanation of why it did not adopt the proposed regulations as final. According to this

[51] Petitioners will argue that the statutory exemption of babysitters, unlike that for companions, is qualified by the words "on a casual basis." *See* 29 U.S.C. § 213(a)(15). But DOL's regulations define the term "on a casual basis" separate and apart from the third-party regulations. *Compare* 29 C.F.R. § 552.104 *with* § 552.109(b).

Court, "the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). This Court has specifically cited an agency's "lack of specific attention to . . . statutory authorization" as "especially important" in declining deference because "the mere promulgation of a regulation, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade.'" *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287, n. 5 (1978). In both instances here, the proposals were supported by valid and consistent reasoning that considered the full statutory text while the final agency actions were not so supported.[52]

C. The Third-Party Regulation Is Inconsistent With The Required Narrow Construction Of FLSA Exemptions

The third-party regulation, allowing business firms to pay their employees less than the minimum wage and no additional compensation for overtime for the physically and emotionally demanding work of caring for elderly and infirm people in their homes, conflicts, finally, with this Court's repeated command that "[a]ny exemption from such humanitarian and remedial legislation must be narrowly construed . . . . To extend an exemption to other than those plainly and unmistakably within its terms and sprit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

The third-party regulation is unpersuasive under *Skidmore*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[52] Petitioners cite the age of the regulation as grounds for deference but it is shaky grounds when the most contemporaneous construction was rejected on faulty grounds and, in any event, "[a] regulation's age is no antidote to clear inconsistency with a statute." *Brown*, 513 U.S. at 122.

Respectfully submitted,

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IN THE

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v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition in this case urged review by this Court for several interrelated reasons. *See* Pet. 10-30; *see also* United States Amicus Curiae Br., No. 04-1315, at 8-19. First of all, the Second Circuit, by invalidating a thirty-year-old Department of Labor regulation, 29 C.F.R. § 552.109(a), has put itself into direct conflict with the Tenth Circuit (which twice upheld the same regulation) and introduced needless uncertainty into the delivery of personal companionship services to the infirm and elderly. Moreover, the Second Circuit arrived at its decision by the highly questionable path of declaring that the regulation—which was promulgated under express grants of lawmaking authority and after notice and comment rulemaking—was just an interpretation without the "force of law" and consequently undeserving of deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467

U.S. 837 (1984). Finally, in denying any deference at all under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the court of appeals alternately ignored and misread the relevant statutory provisions and ultimately based its decision to invalidate Section 552.109(a) on an interpretation of another Department of Labor regulation, 29 C.F.R. § 552.3, that is squarely at odds with the Department's own interpretation of that regulation.

In her Brief in Opposition respondent takes issue with the Petition on a wide array of grounds, ranging from an insistence that there is no conflict between the Second and Tenth Circuits to a contention that an agency's resort to notice and comment rulemaking says little about its intention to promulgate binding rules of law. Respondent also asserts that, in any case, the decisions below are of no real importance. None of these arguments is substantial.

1. a. Although respondent claims that the decisions below are not in conflict with any Tenth Circuit decision (Br. in Opp. 1-4)—characterizing the rulings in the Tenth Circuit cases upholding Section 552.109(a) as "dicta" (Br. in Opp. 1-2)—that contention is off the mark. *See Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2000); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004). In *Johnston*, the court of appeals specifically addressed, and expressly rejected, an argument that Section 552.109(a) "[did] not have the effect of law," 213 F.3d at 561, choosing instead to give it deference under *Chevron*. *Id.* at 562. In the plainest possible terms, the court then concluded: "*We hold* that the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." *Id.* (emphasis added). Subsequently, in *Welding* (a case decided after *United States v. Mead Corp.*, 533 U.S. 218 (2001)), the Tenth Circuit observed: "*We have held* that the domestic service employee need not be employed directly by the person receiving the services or by the person's family for the exemption

to apply." 353 F.3d at 1217 n.3 (emphasis added), citing *Johnston*, 213 F.3d at 562.

Respondent nevertheless contends that the rulings are "dicta" because neither was essential to disposition of the case. Br. in Opp. 1-2. That is not correct under any concept of "dicta" with respect to *Welding*, which upheld the appeal of a third-party employer who could not have prevailed if Section 552.109(a) were invalid. *See* 353 F.3d at 1218-21. But, in any event, respondent appears to be defining "dicta" too broadly. In *Johnston*, the court of appeals did not make a detour into hypothetical issues, but instead rendered two independent holdings (one favorable to the employer, one not), treating each one as a necessary question to be resolved. Both rulings in *Johnston* thus became the law of the Circuit, as the later reference in *Welding* makes evident. *See generally Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1030 (7th Cir. 2004) ("[t]here is a big difference between dicta and alternative holdings").

As matters now stand, therefore, Section 552.109(a) is valid and enforceable in the Tenth Circuit, yet invalid and unenforceable in the Second Circuit. There is no good reason to allow that erratic pattern to persist. While respondent points out (Br. in Opp. 5-6) that some States have their own minimum wage and overtime laws—and thus that wages are not nationally uniform anyway—it is one thing for individual States to require higher compensation in accordance with local conditions, quite a different thing for one federal court, but not another, to order higher compensation as a matter of federal law. The Department of Labor has determined that third-party employees providing companionship services are exempt from federal wage and hour laws, and that rule should be controlling everywhere or not at all. Thanks to a clear-cut split in the Circuits, at present it is neither.

b. Respondent seeks to diminish the importance of the rulings below, asserting that their impact will be minimal. Br. in

Opp. 4-9. The briefs of amici curiae make clear why that is not so. By all accounts, third-party employers newly subject to the wage and hour laws simply cannot absorb the increased costs directly, especially the burden of time-and-a-half overtime obligations. *See* Continuing Care Leadership Coalition Am. Br. 6-7; New York State Assoc. of Health Care Providers Am. Br. 5. To stay in business, therefore, the employers will be left with one (or a mixture) of two choices: they can try to avoid paying the added costs by restructuring how care is provided to the infirm and elderly or they can attempt to pass the costs on to Medicare and Medicaid (or other potential payors). Neither choice is satisfactory. As the amicus briefs describe, any sharp reduction in overtime hours will necessarily disrupt the care received by needy clients, at serious potential cost to their well-being. *See* New York State Assoc. of Health Care Providers Am. Br. 7; Home Care Council Am. Br. 8-11; Continuing Care Leadership Coalition Am. Br. 9-11; City of New York State et al. Am. Br. 8-11; Home Care Assoc. of New York Am. Br. 15-18. As for shifting the costs, even if prompt reimbursement of the higher costs were available—which it is not, *see* National Ass'n for Home Care & Hospice, Inc. Am. Br. 7-9; New York State Assoc. of Health Care Providers Am. Br. 4—government treasuries are not an inexhaustible source of funds. *See* City of New York et al. Am. Br. 6-7. Indeed, in its earlier amicus brief, the United States expressed concern about the adverse effect of the initial Second Circuit decision on federal payments under Medicare and Medicaid, *see* U.S. Am. Br. No. 04-1315, at 16, a likely (if delayed) consequence that respondent seems to confirm. *See* Br. in Opp. 6 (home care "heavily subsidized by federal and state governments under Medicaid and other programs").

It was, in fact, just such concerns that led the Department of Labor to withdraw its proposal to eliminate Section 552.109(a) only four years ago. While respondent cites material from the notice of proposed rulemaking saying that

elimination of Section 552.109(a) would not be particularly costly, Br. in Opp. 7, she nowhere acknowledges that the Department revised its opinion after reviewing numerous critical comments, including those from other federal agencies. Thus, in its final notice, after referring to its former belief that "there would be little economic impact on affected entities if such workers were not exempt from FLSA's minimum wage and overtime pay requirements," 67 Fed. Reg. 16,668 (2002), the Department stated that "numerous commenters on the proposed rule, including multiple government agencies such as the Small Business Administration and the Department of Health and Human Services, seriously called into question the Department's conclusion that there would be little economic impact." *Id.* Nothing cited by respondent demonstrates that the economic impact would be any less disruptive now.[1]

2. With respect to *Chevron* deference, respondent bases her "no deference" argument almost entirely on the fact that Section 552.109(a) is contained in a subpart headed "Interpretations." Br. in Opp. 9-15. Insofar as respondent means to say that, as a matter of law, agency interpretations are never entitled to *Chevron* deference, that position is simply wrong. As we have previously observed, *see* Pet. 17, the two-part *Mead* test by its very terms, makes clear that *Chevron* deference may be granted when "the agency interpretation claiming deference was promulgated in the exercise of [delegated lawmaking] authority." *Mead*, 533 U.S. at 227. That does not mean, of course, that *all* agency interpretations are entitled to *Chevron* deference: the question is whether the

[1] Respondent says that New York Medicaid regulations limit personal care services to 28 hours a week "absent unusual circumstances." Br. in Opp. 8. But those "unusual circumstances" are, in fact, quite usual, including situations in which "assistance by informal caregivers is unavailable, withdrawn, reduced, or unacceptable to the patient." 18 NYCRR Section 505.14(a)(6)(ii)(b)(1)(iii). In such cases, patients can, and often do, receive up to continuous round-the-clock care.

particular interpretation was promulgated pursuant to a grant of lawmaking authority and, in fact, has the force of law. *See Mead*, 533 U.S. at 226-27.

We think that an agency decision to engage in notice and comment rulemaking pursuant to delegated lawmaking authority is, at the very least, strong evidence that the agency is making law. And that seems to be the consensus among federal courts of appeals: following *Mead*, various federal courts of appeals have routinely cited notice and comment procedures as a reason, or *the* reason, for according *Chevron* deference to an agency regulation. *See* Pet. 19-20 (citing cases). While respondent is right that those courts have not engaged in extensive analysis, that fact, far from undermining the importance of notice and comment rulemaking, simply illustrates how much weight the federal courts naturally give to agency use of that relatively formal process. In contrast, by treating notice and comment as essentially irrelevant to whether an agency regulation has the effect of law, *see* Pet. 20, the Second Circuit has wrongly declined to give proper respect to legitimate agency lawmaking.

Respondent relies on various cases giving only *Skidmore* deference to Department of Labor "interpretations." *See* Br. in Opp. 15. But not all Department of Labor "interpretations" are alike. For example, in the process of implementing the Section 213(a)(1) exemption for "bona fide executive, administrative, or professional" employees, 29 U.S.C. § 213(a)(1), the Department long ago issued a broad range of "interpretations" *without* undertaking the notice and comment process. *See* 14 Fed. Reg. 7730 (1949). It is unsurprising that such agency guidance would receive no more than *Skidmore* deference, as the cases cited by respondent demonstrate. However, where the Department *has* engaged in notice and comment rulemaking—as it did here and has done subsequently for at least one Section 213(a)(1) regulation (*see* discussion below)—a higher standard of judicial deference should be accorded.

The decision in *Auer v. Robbins*, 519 U.S. 452 (1997), reflects that difference. There, the Court upheld a Section 213(a)(1) regulation that was located in a subpart entitled "Interpretations." In his brief in *Auer*, the Solicitor General specifically called attention to that heading, observing: "Although the 'salary basis' test (29 C.F.R. 541.118) appears in the 'interpretations' subpart (Subpart B) of Part 541, rather than the 'general regulations' subpart (Subpart A), that placement does not affect the level of deference owed to the rule." United States Amicus Curiae Br., No. 95-897, at 16 n.4. The brief then went on to note that "Section 541.118 was promulgated pursuant to notice and comment rulemaking in accordance with the statutory authorization in Section 13(a)(1). *See* 19 Fed. Reg. 1321-1322 (1954)." *Id.* The Court accorded the regulation full *Chevron* deference. *See* 519 U.S. at 457.[2]

3. Respondent's discussion of *Skidmore* deference largely tracks the Second Circuit's discussion, Br. in Opp. 20-28, including the court of appeals' conspicuous slighting of the relevant statutory provisions. *See* Br. in Opp. 20-21 (11-line discussion of statutory language). Thus, while respondent refers to the "text" of the Act, she almost completely ignores the language of the coverage provisions in the 1974 Amendments, 29 U.S.C. §§ 206(f), 207(*l*), especially language setting forth the employees deemed to be "[e]mployees in domestic service" under Section 206(f). Those provisions, however, shed helpful light on the interpretation of the similar term "employee employed in domestic service employment"

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[2] Respondent says that *Auer* is inapposite because the regulation "was . . . entitled to heightened deference as the agency's construction of its own regulation," Br. in Opp. 15-16 n.18, but she is focusing on the wrong part of the *Auer* opinion. Although the Court later addressed the agency's interpretation (in an *amicus* brief) of its own regulation, *see* 519 U.S. at 461-63, the earlier part of the *Auer* opinion considered whether the regulation itself "reflects an unreasonable interpretation *of the statutory exemption*." 519 U.S. at 457 (emphasis added). Applying *Chevron* deference, the Court held that it did not. 519 U.S. at 457-58.

in Section 213(a)(15). *See* Pet. 25-27. And, while respondent advances at least one seemingly favorable tidbit of legislative history, Br. in Opp. 21, she makes no attempt to come to terms with other contrary legislative history indicating that the coverage provisions—subject, of course, to the specific exemptions in Section 213(a)(15)—were meant to have broad sweep. *See, e.g.*, H.R. Rep. No. 93-913, 93 Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2845 ("[i]t is the intent of the committee to include within the coverage of the Act all employees whose vocation is domestic service").[3]

Respondent likewise fails to explain away the mysterious coverage gap that her interpretation of the Act would produce. As we explained in the Petition, Pet. 26, and as the Department noted in its Advisory Memorandum, Pet. App. 59a-60a, if the 1974 Amendments covered only domestic workers employed by the homeowner receiving care and not those employed by third parties, then domestic workers (cooks, maids, housekeepers, etc.) employed by agencies too small to be covered by the "enterprise" provisions would not be covered at all. The only solution offered by respondent to this troubling textual problem is a wholly result-oriented suggestion that federal courts could treat the term "employees in domestic service" expansively for purposes of determining coverage under Section 206(f), but then turn around and treat the closely related term "employees employed in domestic service employment" more narrowly for purposes of applying the exemption under Section 213(a). Br. in Opp. 28. There is no good reason to think Congress had this kind of haphazard treatment in mind, and respondent's attempt to ground it in the Department's own regulations runs into the fact that the

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[3] Although respondent argues that Congress did not "intend" to exempt third-party employers, Br. in Opp. 21-28, the Second Circuit largely abandoned any reliance on congressional intent. *See* Pet. App. 5a ("[c]onsideration of congressional intent . . . does not lead to any definitive conclusion regarding the enforceability of § 552.109(a)").

Department itself interprets those regulations in an entirely different way. *See* Pet. App. 54a-63a.

We have previously argued that the Department's interpretation of its own regulations merits substantial deference. *See* Pet. 28-30; *Stinson v. United States*, 508 U.S. 36, 45 (1993). For her part, respondent claims that the Department has forfeited the right to deference by refusing to read certain words in the definition of "domestic service employment" in 29 C.F.R. § 552.3 ("private home . . . of the person by whom he or she is employed") as excluding employees of third-party employers. *See* Br. in Opp. 26. But the Department has explained in some detail that those words were simply not meant to address whether third-party employees are within the category of workers engaged in "domestic service employment," much less deliberately to say that they are not. *See* Pet. App. 55a-63a. By contrast, respondent has no explanation at all for the inexplicable consequence of her (and the Second Circuit's) interpretation of the same regulations: that the Department expressly extended the companionship services exemption to third-party employers in Section 552.109(a) even though it had just declared those same employers ineligible for it in Section 552.3. Given the choice between that farfetched interpretation and the Department's own more reasonable explanation, it would be preferable to adopt the latter even if no deference to agency expertise tilted the balance.

4. As a final point, respondent argues that Section 552.109(a) is procedurally invalid, saying that the Department should have sought another round of comments in 1975. Br. in Opp. 28-30. But the district court held that this argument was not properly raised, *see* Pet. App. 38a-39a n.3, and the Second Circuit did not rely on it. *See* Pet. App. 28a. Moreover, the argument is strikingly weak. Even if one can make a procedural challenge thirty years after final agency action—and even leaving aside the fact that the Department

has since engaged in several additional notice and comment rulemakings in order to decide whether to amend the regulation—it is readily apparent that the Department did not need to invite more comments in 1975. As the D.C. Circuit has stated, a central question in assessing the need for further comment is "whether a new round of notice and comment would provide the *first* opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (internal quotation marks omitted) (emphasis in original quotation). Here, it would not: all interested parties were given a full chance to address whether the exemption should apply to third-party employers (the question raised by the proposed rule). Once parties have received the initial opportunity to "comment meaningfully," *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (internal quotation marks omitted), "if the agency then alters its course in response to the comments it receives, little purpose would be served by a second round of comment." *Id.*[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] Urging further delay, Br. in Opp. 3, respondent suggests that other cases will be raising the same issue. But the prospect of more litigation is a reason for granting review, not postponing it. Amicus Home Care Council of New York City, Inc. has noted that, in addition to cases outside the Second Circuit, there are already more than 20 pending cases challenging Section 552.109(a) in the Southern and Eastern Districts of New York. Home Care Council Am. Br. 11 & n.2.

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No. 06-593

IN THE
SUPREME COURT OF THE UNITED STATES

LONG ISLAND CARE AT HOME, LTD., et al.,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Second Circuit

BRIEF *AMICI CURIAE* OF AARP AND THE OLDER WOMEN'S LEAGUE (OWL) IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF AARP AND THE OLDER WOMEN'S LEAGUE (OWL) IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*[1/]

AARP is a nonpartisan nonprofit membership organization of more than thirty-eight million persons aged fifty and older dedicated to addressing the needs and interests of older Americans. Most older and disabled persons in need of long term care and/or supportive services prefer to receive these services in their own home. Mary Jo Gibson, *Beyond 50.03: A*

[1/] No counsel for any party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Both parties have consented to the filing of all *amici curiae* briefs, in accordance with their general consent letters filed with this Court.

Report to the Nation on Independent Living and Disability, (AARP Public Policy Institute, April 2003). AARP thus has a substantial interest in securing quality home care for its members and others. AARP joined as *amici curiae* in the case of *Olmstead v. L.C.*, 527 U.S. 581 (1999), urging this Court to reach the decision it ultimately adopted - that unnecessary institutionalization amounts to discrimination under the American with Disabilities Act (ADA) and that states must create and implement comprehensive, effective working plans to serve persons in home and community-based settings rather than in institutions. AARP Foundation Litigation attorneys have subsequently been involved in litigation aimed at implementing the *Olmstead* decision. *See, e.g., Chambers v. City and County of S.F.*, C.A. C-06-06346 (N.D. Cal. filed Oct. 15, 2006) (advocating for the expansion of home and community-based care).

AARP is acutely aware of the shortage of home care workers and the need to improve the wages and benefits received by workers to help ensure their availability and a higher quality of care. To that end, AARP Foundation Litigation is co-counsel in *Ball v. Biedess*, Civ. 00-0067-TUC-EHC (U.S.D.C. Ariz.) (elderly and disabled in Medicaid Home and Community Based Services program forced to go without necessary care due to shortage of home health care workers caused in part by wages too low to recruit and retain sufficient numbers of home care workers).

The Older Women's League (OWL) is a national grassroots membership organization that focuses solely on issues unique to women as they age. OWL strives to improve the status and quality of life of midlife and older women. OWL is a nonprofit, nonpartisan organization that accomplishes its work through research, education, and advocacy activities conducted through a chapter network. Now in its twenty-third year, OWL provides a strong and effective voice for the more than fifty-eight million women age forty and over in America.

OWL's interest in this case stems from its longstanding interest in protecting the interests of the three core constituencies in long-term care: long term care recipients; their

family and friends; and home care workers, who provide paid services in communities. A majority of each of these groups is women. The plight of direct-care workers in particular is a serious concern of OWL's membership. Improving the working conditions for home care workers by extending the legal right to earn minimum wage and overtime pay without exception under the Fair Labor Standards Act has a direct and beneficial impact on women, particularly older women.

SUMMARY OF ARGUMENT

Home care workers, who are predominately women with children, are vital to America's long term care delivery system. Providing the vast majority of compensated face-to-face care to older persons and persons with disabilities, home care workers guarantee these individuals can maintain some degree of functionality and continue living in the privacy and comfort of their own homes. Paraprofessional Healthcare Institute, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care* (Jan. 2001), *available at* http://www.directcareclearinghouse.org/download/Aspen.pdf (hereinafter Paraprofessional Healthcare); Robyn I. Stone & Joshua M. Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis* (Oct. 2001).

Although performing critically important functions, home care workers receive low pay and minimal or no benefits. Such working conditions have led to high turnover rates and acute shortages of home care workers across the country. *See* Center for California Health Workforce Studies, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* (Feb. 2006) (hereinafter California Health). The shortage of these workers will only intensify as the American population ages and the demand for home care significantly increases. More and more, older and disabled persons are expressing a preference for home-based care. Paraprofessional Healthcare, *supra*. Yet the continued exclusion from coverage by the Federal Labor Standards Act (FLSA) of home care workers who are employees of third parties will only perpetuate the shortage of these workers, widening the already existing gap between supply and demand.

The exclusion is inconsistent with the purposes of the FLSA, which sought to provide workers with needed protection *and* ensure an adequate supply of domestic workers.

Based on extensive experience with federal and state programs that finance much of the provision of home care services through third party agencies, and based on the understanding that better pay for home care workers equates with better care for home care clients, *Amici* believe that exempting third party agencies of the minimum requirements of the FLSA does not serve, but rather compromises the interests of both older and disabled persons. This Court should affirm the Second Circuit's decision that home care workers are clearly part of the workforce entitled to coverage under the FLSA and recognize the rights of these critically needed employees and the needs of America's long term care consumers.

ARGUMENT

In 1974, Congress passed a series of amendments to the FLSA, 29 U.S.C. § 201, originally enacted in 1938. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified at 29 U.S.C. 201-219 (2000)). These amendments extended FLSA's minimum wage, overtime pay, and other protections to domestic employees; however, they provided an exemption for any employee employed in "domestic service employment to provide companionship services." 29 U.S.C. § 213(a)(15). The Department of Labor ("DOL" or "Department") subsequently defined "domestic service employment" as "services of a household nature performed by an employee in or about a private home . . . *of the person by whom he or she is employed*," thereby only exempting employees employed by the home's owner or resident. Domestic Service Employment, 29 C.F.R. § 552.3 (2007) (emphasis added). However, in another regulation, the DOL provided that "[e]mployees who are engaged in providing companionship services . . . and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements." Third Party Employment, 29

C.F.R. § 552.109(a). This second regulation, the third-party regulation, amounts to a broadening of the exemption and a stretching of congressional intent beyond natural bounds.

Supporting the current rule, Petitioners argue that the economic impact that would result if workers were not exempt from FLSA's minimum wage and overtime pay requirements would cause severe disruptions for clients needing care. *See* Brief for Petitioners, *Long Island Care at Home, Ltd., et al. v. Coke*, No. 03-7666, at 43-44 (U.S., May 29, 2005). However, *Amici* believe the opposite: that *failing* to extend FLSA protection will result in severe disruptions in care. *Amici* support the decision of the Second Circuit, believe the court properly afforded the third-party regulation *Skidmore* deference, not *Chevron* deference, and urge this Court to affirm, thereby ensuring a higher quality of care and continuity of care for America's older and disabled persons in need of home health services. *See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift*, 323 U.S. 134 (1944).

I. A Rapidly Growing Demand for Home Care Services Coupled with an Increasing Shortage of Home Care Workers Places America's Older and Disabled Persons in Peril.

In 2000, thirteen million Americans received some form of long term care, the bulk of which was provided by direct care workers. Dep'ts of Health and Human Servs. & Labor, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation, Report to Congress* (May 2003) (hereinafter *Future Supply*); *see also* Paraprofessional Healthcare, *supra*. Direct care workers are paraprofessionals who carry a variety of job titles, including personal care assistants, home care workers, home health aides, and certified nursing assistants (CNAs). They work in a variety of settings, including private homes, adult day centers, assisted living residences, and nursing homes. Bernadette Wright, *Direct Care Workers in Long Term Care (*AARP Public Policy Institute, May 2005). There are more than a million direct care workers in the United States whose jobs include assisting with

personal care activities, providing oversight for people with cognitive and mental impairments, observing and reporting changes in a client's condition, administering medications and measuring vital signs, preparing meals and housekeeping, and providing comfort and companionship. *Id.* Providing the vast majority of face-to-face contact with long term care patients, direct care workers are considered the lifeblood of the long-term care industry. Paraprofessional Healthcare, *supra.*

Although direct care workers constitute the primary providers of long term care today, almost every state in the country reports a critical shortage of direct care workers. *Id.* This shortage of workers in the face of strong and increasing demand has created a "care gap," leaving many older and disabled clients with inadequate or even no source of care. *Id.* Furthermore, from 2000 to 2050, the total number of individuals in need of long term care services will increase by over 100%, from thirteen million to twenty-seven million, with the vast majority of individuals preferring home care to institutional care; however, the traditional care giving population - women age twenty to fifty-four - is projected to increase by just nine percent during this time. *Future Supply, supra.* Such disparities in growth will only widen the "care gap," compromising the health and safety of older and disabled persons.

A. There is a strong and growing demand for home care.

Due to a convergence of factors, there is a growing demand for home care services. First, the public increasingly reports a preference for home-based care over institutionalized care. Paraprofessional Healthcare, *supra.* This preference is evidenced by the fact that although the population in need of long term care services is growing, nursing home bed growth has slowed. Charlene Harrington et al., *Trends in the Supply of Long-Term-Care Facilities and Beds in the United States*, 24 No. 4 Journal of Applied Gerontology 265 (Aug. 2005). From 1990 to 2002, the number of nursing home beds declined from 66.7 per 10,000 to 61.4 per 10,000 people. *Id.* In response to consumer preferences, there has been an ongoing shift in long

term care financing away from institutional care. Paraprofessional Healthcare, *supra*. Congress sought such an end in passing the ADA, and this Court in *Olmstead v. L.C.* affirmed the illegality of unnecessary institutionalization. 527 U.S. 581 (1999). *Olmstead* and subsequent cases have moved state Medicaid programs away from a bias in favor of nursing home care and toward more home and community-based care. Sara Rosenbaum & Joel Teitelbaum, *Olmstead at Five: Assessing the Impact*, Kaiser Family Foundation (2004), *available at* http://www.kff.org/medicaid/upload/Olmstead-at-Five-Assessing-the-Impact.pdf. Consequently the need for home care workers has expanded.

Second, with the aging of the U.S. population and increases in life expectancy, the forecast for the home care industry is one of unprecedented growth. *See* California Health, *supra*. As the Baby Boom generation begins to turn sixty-five in 2011, the percentage of the population in need of long term care services will rapidly increase. U.S. Census Bureau, *65+ in the United States: 2005* (Dec. 2005). The older population is projected to double from thirty-six million in 2003 to seventy-two million in 2030, an increase from twelve to twenty percent of the population as a whole. *Id.* In that time, the U.S. population aged eighty-five and older - those most likely to need home care services - is projected to increase from 4.3 million to 8.9 million. *Nursing Workforce: Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern*, Testimony Before the S. Comm. on Health, Education, Labor and Pensions, 107th Cong. (2001) (statement of William J. Scanlon, Director, Health Care Issues, General Accounting Office), *available at* http://www.gao.gov/new.items/d01750t.pdf. To meet this need, the number of available direct care jobs will increase at a much higher rate than employment in the overall labor market between 2002 and 2012. Wright, *supra; see also Occupational Outlook Handbook*; D.E. Hecker, *Occupational Employment Projections to 2012*, Monthly Labor Review (Feb. 2004); Nat'l Clearinghouse on the Direct Care Workforce, *Who Are Direct Care Workers?*, Fact sheet (Sept. 2004).

B. The country faces a severe and increasing shortage of home care workers due to inadequate pay for taxing work.

In all geographic regions of this country, there is an ongoing shortage of home care workers needed to meet the demand for home care services. *See* Health Res. and Servs. Admin., *Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs*, Dep't of Health and Human Servs. 14 (Feb. 2004) (hereinafter Health Res. and Services Admin.); *see also* Dorie Seavey & Vera Salter, *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants* (AARP Policy Institute, Oct. 2006). The undersupply of home care workers is consistently attributed to inadequate wages and benefits, and the shortage of workers leads to both reductions in quality of care and disruption in access to care for older and disabled persons. *See, e.g.*, Paraprofessional Healthcare, *supra*.

i. Home care workers, who are predominately women supporting children, perform difficult yet vital jobs for low pay and limited or no benefits.

In comparison to the general workforce, home care workers are more likely to be women, non-white, and unmarried with children. Wright, *supra*. The typical home care worker is a single mother between the age of twenty-five and fifty-four, economically disadvantaged, with low levels of educational attainment. Stone & Wiener, *supra*. Most choose direct care work because they want to help people and are interested in working in health care. Wright, *supra*. Unfortunately, home care workers typically receive very low pay for their work. *Id.* In fact, they are among the lowest paid workers in the U.S. service industry. Stone & Wiener, *supra*. Thus, annual wages for full-time work range from $16,750 to $20,760. Wright, *supra*. Yet, because many home care aides work less than full time, the median annual income for the profession was $12,300 in 2001. California Health, *supra*. As

a result, almost one-third of these workers return from work to a family living in poverty. Paraprofessional Healthcare, *supra*.

Beyond low pay, home care workers often have no benefits, high workloads, unsafe working conditions, inadequate training, lack of respect from supervisors, lack of control over their jobs, and few opportunities for advancement. Wright, *supra*. The occupational group "Nursing Aides, Orderlies, and Attendants," which includes home health aides, had the second-highest number of work-related injuries and illnesses among all occupational groups in 2002 due to the strenuous work of lifting and moving patients; yet approximately forty percent of these employees have no health insurance. California Health, *supra*.

ii. Low pay for this vulnerable population leads to low job satisfaction, poor retention rates, and diminished quality of care for older and disabled persons.

The consequences of chronic low pay for home care workers are well known. Home care workers report low job satisfaction, and the industry suffers from high turnover rates. *See, e.g.* Robyn I. Stone, *The Direct Care Worker: The Third Rail of Home Care Policy,* 25 Annu. Rev. Public Health 521 (2004). Turnover rates in home care average twelve to sixty percent on an annual basis. Health Res. and Services Admin., *supra*. However, one report, compiling research studies of individual home health providers, noted that turnover rates for home care employers ranged from forty to 166 percent. Better Jobs Better Care, *The Cost of Frontline Turnover in Long-Term Care* (Oct. 2004) (hereinafter Better Jobs). These extremely high turnover rates produce a host of negative effects for clients.

Workforce instability leads to inadequate, unsafe care as well as service delivery disruptions and failures, endangering older and disabled persons' ability to remain in their homes. *See* Order of August 13, 2004, *Ball v. Biedess*, Civ. 00-0067-TUC-EHC (U.S.D.C. Ariz.), *appeal pending, Ball v. Rogers*, No. 04-169 (9th Cir. docketed Oct. 5, 2004) (failure of services

to meet the needs of elderly and disabled Medicaid beneficiaries caused by inadequate wages of home care workers). High turnover rates in the profession lead to a dearth of workers with extensive, hands-on experience in providing care, thereby lowering the quality of care clients receive in their homes. *See* Paraprofessional Healthcare, *supra*. Furthermore, lacking continuity with their home care aides, many older and disabled persons fail to build trusting relationships with their providers and are forced to continually instruct the new workers as to the specific care they need. *See* California Health, *supra*. This causes mental strain in addition to the physical ailments many are already battling. *See id.*

II. Extending FLSA Protection to Home Care Workers Will Help Guarantee Older and Disabled Persons Proper Access and Care, and is Therefore Consistent with Congressional Intent.

The gap between the supply of and demand for home care and other direct care workers will increase in the upcoming years. Nora Super, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand* (2002). Recognizing that this "care gap" will continue to expand until the quality of direct care jobs improves, numerous states, localities, and advocates have employed various strategies to bolster the wage rates and benefits for direct care workers delivering services paid for by Medicaid. Paraprofessional Healthcare, *supra*; Seavey & Salter, *supra*. These strategies include wage pass through legislation,[2/] living wage ordinances,[3/] minimum wage improvements,[4/] and litigation against state Medicaid agencies. While some of these strategies

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[2/] Legislation that earmarks appropriations to go directly to specific groups of workers. Seavey & Salter, *supra* note 11, at ii.

[3/] Sets a wage floor for a specific group of workers; generally requiring wages needed to support a family at a level above the poverty line. Seavey & Salter, *supra* note 11, at iii.

[4/] Establishes a wage floor for all businesses and workers in a given city, state, or country. Seavey & Salter, *supra* note 11, at iii.

have been helpful in individual states, these efforts are not enough.

The lack of FLSA protection reduces the quality of home care workers' jobs and consequently impairs the quality of care provided to home care clients. *See* Paraprofessional Healthcare, *supra* ("Health care researchers have long noted the connection between the quality of direct care jobs and the quality of care received by clients."). Congress' intent in enacting the 1974 FLSA amendments was to promote fair working conditions for domestic workers and thereby ensure an adequate supply of domestic workers, including those providing home care for older persons, but these salutary effects will not be felt by home care workers or their clients if the workers continue to be deprived of the Act's protections.

A. Better working conditions, especially decent wages, are critical to ensure a supply of workers who can meet the demand for home care services and provide higher quality care.

To guarantee a sufficient and qualified workforce of home care aides, the quality of these jobs must be improved. Providing a living wage will attract more workers as well as increase job satisfaction and retention for those already providing care. *See generally* H. Stephen Kaye et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25 No. 4 Health Affairs 1113 (2006). For example, a study conducted in San Francisco County, California found that almost doubling the wage rate for independent home health workers in the county between November 1997 and February 2002 yielded a fifty-four percent increase in the number of workers and a seventeen percent decrease in the number of workers leaving the job within their first year of employment.[5/] Stone, *supra*.

[5/] Just as the author notes, *amici* also recognize that other factors such as changes in the Welfare-to-Work requirements could have accounted for some of the increase in worker supply and decrease in job turnover. *See* Stone, *supra*.

Contrary to Petitioner's contentions and the assertions of *amici* supporting Petitioner, extending FLSA protection to home care workers will not jeopardize the businesses of third party employers or "almost certainly cause severe disruptions for clients needing care." Petition for Writ of Certiorari, *Long Island Care at Home, Ltd., et al. v. Coke*, No. 03-7666, at 15 (U.S. May 29, 2005); *see also* Brief for New York and New York State Associations of Counties as *Amici Curiae* Supporting Petitioner, *Long Island Care at Home, Ltd., et al. v. Coke*, No. 03-7666 (U.S., May 29, 2005). While some third party employers already operating with small profit margins may struggle to provide their employees with overtime pay - which would be required if third party employers of home health workers are no longer exempt - there is no evidence that this would be the rule rather than the exception. In fact, the U.S. Department of Labor reports "home health aides" to be the fastest growing occupation in the country from 2004-2014, and home health care is deemed to be burgeoning industry. Bureau of Labor Statistics, *Fastest Growing Occupations*, 2004-14, U.S. Department of Labor, *available at* http://www.bls.gov/emp/emptab21.htm; *see also* Inc.com, *Top 10 Industries to Start and Grow a Business*, Apr. 2005, *available at* http://www.inc.com/articles/2005/04/top_10 (names home health care as number six on top ten list of industries that "hold the most promise for savvy entrepreneurs over the next 10 years").

Furthermore, Petitioner and its *amici* fail to consider that at least some of the costs associated with increased wages will be offset by savings from reduced turnover.[9] *See* Paraprofessional Healthcare, *supra*. High turnover often leads

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[9] Petitioner's *amici* make several broad, doomsday-like statements regarding the consequences of extending FLSA protection to home care workers but provide almost no authority for such assertions. *Amici* cite three "additional annual costs" that will be incurred, the largest of which ($168 million) is attributed to billable and overtime hours for 24-hour daily care provided by "sleep-in" home attendants. Sleep-in home attendants fall under a separate exemption, 29 U.S.C. § 213(b)(21), so those costs should not have been attributed to *amici's* cost projections. *See* City of New York, et al. Amici Br. at 23.

to high recruitment and orientation costs, high retention costs, high separation costs, high temporary replacement costs, and foregone sales revenue. *Id.* Although estimates for these costs vary, they are significant. *See, e.g.*, Better Jobs (applying a "rule-of-thumb," which holds that the comprehensive cost of replacing a worker is twenty-five percent of his or her annual compensation, and estimating that the average turnover cost for a direct care worker is in the range of $4,200 to $5,200). A 1998 study by the Governor's Council on Disabilities and Special Education in Alaska estimated the average statewide cost of turnover per direct service provider to be $2,341, and a Massachusetts agency that employs nearly 2,000 direct care workers estimated their replacement costs to be approximately $5,276 per worker. *Id.* Increasing wages for home care aides can alleviate both recruitment and retention costs for providers. *See, e.g.*, Leon, J et al., *Pennsylvania's Frontline Workers in Long-Term Care: The Provider Organization Perspective*, Polisher Research Institute (Feb. 2001).

Most importantly, increasing pay for home care workers will result in better care for older persons and persons with disabilities. The Institute of Medicine has noted the connection between working conditions for care-giving personnel and the quality of care clients receive, recommending that "[f]ederal and state governments, as appropriate, should undertake - for all long-term-care workers and for all settings-measures to improve work environments including competitive wages, career development opportunities, work rules, job design, and supervision that will attract and retain a capable, committed work force," thereby helping to ensure proper care for the those in need of long term care services. Institute of Medicine, *Improving the Quality of Long-Term Care, Summary* (Jan. 2001) *available at* http://www.iom.edu/Object.File/Master/4/136/LTC8pagerFINAL.pdf. Because providing higher pay and offering better employment benefits yields improved recruitment and retention, extending FLSA protections to home care workers will result in lower turnover costs for providers and better care for clients.

B. Providing Workers like Ms. Coke with FLSA Protection is Consistent with the Purposes of FLSA.

The DOL Memorandum states that one of the purposes of the 1974 FLSA amendments was to assure that working families could find home care for older and disabled persons in their households. Wage and Hour Advisory Memorandum No. 2005-1, from Alfred B. Robinson, Deputy Administrator, Dep't of Labor to Regional Administrators, District Directors (Dec. 1, 2005). Even in 1973, Congress was concerned with the growing gap between supply and demand for services in the home.

> It is important to note . . . the demand for household workers is not being met. Bringing domestics under the Fair Labor Standards Act would not only assure them a minimum wage but would enhance their status in the community. It is expected that the supply of domestic workers will increase as their pay and working conditions improve. Minimum wages should serve to attract skilled workers to these jobs at a time when the need for skilled domestic employees is greatly increasing. S. Rep. No. 93-300, 93d Cong., 1st Sess. (July 6, 1973).

The exclusion of direct care workers employed by third parties from the FLSA's protections is only helping to perpetuate the already existing shortage of these workers.

Furthermore, when Congress enacted the companionship exemption, Congress intended to exempt only casual sitters for older persons or children. *See* Molly Biklen, Note, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Colum. Hum. Rts. L. Rev., 113 at 123-125; 119 Cong. Rec. 24801 (daily ed. July 19, 1973) (statement of Sen. Williams) (describing a babysitter's job as "to watch the youngsters," and the companion's job as "the same role - to be

there and to watch an older person."). As noted by the Second Circuit, the DOL has recognized in recent years that home care aides perform a much greater variety of tasks in the home and that the current domestic service regulations "exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 213(a)(15)." *Coke*, 376 F.3d at 125 (2d Cir. 2004) (Application of Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481, 5482, proposed Jan. 19, 2001).

Congress did not intend to exempt paraprofessional home care workers like Ms. Coke, employed by third party agencies like Long Island Care at Home, from the basic FLSA protections. FLSA protections should be extended to home care workers serving clients in their homes, as such protections will strengthen the home care workforce and result in higher quality of care and continuity of care for America's older and disabled persons.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge the Court to affirm the Second Circuit's decision below.

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No. 06-593

IN THE

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LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE,

Petitioners.

v.

EVELYN COKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ALLIANCE FOR RETIRED AMERICANS, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE ALLIANCE FOR RETIRED AMERICANS, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The Alliance for Retired Americans (ARA), American Association of People with Disabilities (AAPD), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and Change to Win (CTW) file this brief *amici curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

The ARA is an organization of three million retired workers that advocates for the rights of older and retired persons. The AAPD is a membership organization that represents the interests of disabled Americans. Many members of the ARA and the AAPD receive care from agency-employed home care workers and each group has an interest in the salary and benefits that agency workers receive, as these factors affect the availability and quality of care. The AFL-CIO is a federation of 54 national and international labor organizations with a total membership of ten million working men and women. CTW is an alliance of seven national and international labor organizations with a total membership of six million working men and women. Among the workers represented by AFL-CIO and CTW affiliated unions are numerous home care and home health aides.

SUMMARY OF ARGUMENT

Congress amended the Fair Labor Standards Act (FLSA) in 1974 to expand coverage to employees whose vocation is domestic service, granting these workers the same protections and employment standards that most other workers enjoy. Agency-employed domestic service workers were generally entitled to FLSA coverage prior to the 1974 amendments, and thus the amendments primarily affected workers employed by individual households. A narrow category of workers was excluded from this expansion of coverage: workers employed by individual households to provide babysitting or companionship services.

Agency-employed home care workers perform the type of work that the 1974 Congress intended to cover under FLSA. They are engaged in a full-time vocation and depend on their wages to support their families. Their work is demanding and difficult, in contrast to the occasional tasks Congress envisioned for exempted companions. And they are employed by agencies that can easily comply with FLSA requirements,

unlike the individual household employers that Congress sought to protect through the companionship exemption.

Affirming the decision of the court below will not result in dire consequences for elderly and disabled home care clients or for the workers and agencies that serve them. Petitioners' and *amici*'s claims that FLSA coverage of agency-employed workers will decrease the quality or availability of home care services are speculative and untrue. To the contrary, as Congress recognized in 1974, providing coverage for these workers will help increase and stabilize the labor supply, which is currently insufficient to meet the rapidly growing demand for home care services.

ARGUMENT

In 1974, Congress amended the Fair Labor Standards Act ("FLSA") to cover domestic service workers employed in private households. 29 U.S.C. §§ 206(f) & 206(l). Prior to the 1974 amendments, domestic service workers employed by a third party employer were generally covered by the FLSA but domestic service workers employed directly by a household were not. 29 U.S.C. § 203(s)(1). Pet. App. 30a. The purpose of the 1974 amendments was to extend FLSA coverage to those domestic service workers who had previously been excluded, principally those employed directly by the household they served.

Congress excluded one group of domestic service workers from the expanded FLSA coverage—those "employed in domestic service employment" to provide either "baby-sitting services" or "companionship services." 29 U.S.C. § 213(a)(15). The "companionship exception" was intended to reach only those domestic service workers employed directly by the household they serve. That exception was not intended to contract FLSA coverage by excluding domestic service workers employed by third parties. The justification for the "companionship exception" was that households

should not be burdened with FLSA compliance with respect to a class of employees who were not likely to be pursuing domestic service as their principal source of income. As we now show, domestic service workers employed by third party employers are not part of this class.

I. CONGRESS EXEMPTED A NARROW GROUP OF INDIVIDUALS THAT DID NOT RELY ON DOMESTIC EMPLOYMENT FOR ESSENTIAL INCOME FROM THE 1974 FLSA EXTENSION TO HOUSEHOLD-EMPLOYED DOMESTIC WORKERS.

The 1974 FLSA amendments were intended "to include within the coverage of the Act *all employees whose vocation is domestic service*."[2] The expansion was premised on the understanding that many domestic service workers were responsible for the economic support of their families,[3] and that the wage they earned without FLSA coverage was inadequate to lift them out of poverty.[4] The one group that Congress did not consider to fall into this category was individuals employed directly by households to provide baby-sitting and companionship services. Thus, in discussing the "companionship exception," the Senate and House Committee reports explained that "[p]eople who will be employed in

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[2] S. Rep. No. 93-690, at 20 (1974) (emphasis added).

[3] *See, e.g.*, 120 Cong. Rec. 5276 (1974) (Representative Williams) (citing statistic that 200,000 female domestic workers were heads of families); 119 Cong. Rec. 18,347 (1973) (Representative Green).

[4] *See, e.g.*, 119 Cong. Rec. 24,827 (1973) (Senator Humphrey) (commenting that average wage of household workers was "not an adequate income for one person. But a large portion of these women are heads of households."); 119 Cong. Rec. 18,347 (1973) (Representative Green) (pointing out that two-thirds of domestic workers had dependent children, and that over half of these workers lived in poverty).

the excluded categories are not regular bread-winners or responsible for their families' support."[5]

In this regard, Senator Williams, Chair of the Labor Subcommittee, explained what was meant by the word "companion":

> We use the situation in which people are in a household not to do household work but are there, first, as baby-sitters. I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters. "Companion," as we mean it, is in the same role—to be there and to watch an older person, in a sense.[6]

And, when another senator interjected, "In other words, an elder sitter," Senator Williams replied, "Exactly."[7]

Similarly, Senator Burdick observed that, unlike "the professional domestic who does this as a daily living," many individuals hire a "neighbor [who] comes in and sits with" an elderly parent.[8] While he acknowledged that babysitting and companionship services, "of course, entail[] some work," he characterized it as "perhaps making lunch for the children or making lunch for the infirm person, and may[be] even . . . throwing some diapers in the automatic washing machine for the baby."[9]

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[5] S. Rep. No. 93-690, at 20 (1974). *See also* H.R. Rep. No. 93-913, at 36 (1974) (Congress did not expect employees in those excluded categories to be "regular bread-winners or responsible for their families support"); S. Rep. No. 93-358, at 27 (1973) (same).

[6] 119 Cong. Rec. 24,801 (1973).

[7] 119 Cong. Rec. 24,801 (1973).

[8] 119 Cong. Rec. 24,801 (1973). *See also* 119 Cong. Rec. 24,797 (1973) (Senator Dominick reads letter from woman who explains she hires companion for her elderly mother; according to letter, companion spends time "watching TV, reading, relaxing, visiting with my mother, using [the] telephone, [and] eating").

[9] 119 Cong. Rec. 24,801 (1973).

In short, Congress meant to extend FLSA coverage to domestic service workers who relied on their employment as an essential source of income, and to exclude only those individuals engaged by a single household to watch over children or keep an elderly or disabled person company. This narrow exemption was never meant to cover the hundreds of thousands of home care workers who make domestic service their vocation.

II. HOME CARE WORKERS EMPLOYED BY AGENCIES ARE THE TYPE OF DOMESTIC WORKERS CONGRESS INTENDED TO COVER UNDER FLSA.

Home care agencies employ approximately 70%, or hundreds of thousands, of home care workers.[10] The agencies create full-time jobs by assigning home care workers to multiple households, allowing the agencies to dominate the labor market for home care services. There are more than 23,000 home care agencies in the United States.[11] For-profit agencies have assumed an increasingly dominant role in the home care industry, with a share of the market rising above

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[10] UCSF Center for California Health Workforce Studies, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* 30 (Feb. 2006) (available at http://www.futurehealth.ucsf.edu/geria/062404-Geria%20Final.pdf) [hereinafter UCSF Health Workforce Studies].

[11] National Center for Health Workforce Analyses et al., *Nursing Aides, Home Health Aides, and Related Health Care Occupations – National and Local Workforce Shortages and Associated Data Needs* viii, 12 (U.S. Dep't Health and Human Servs.: 2004) (available at ftp://ftp.hrsa.gov/bhpr/nationalcenter/NursingAndHomeAides.pdf) [hereinafter Nat'l Ctr. for Health Workforce Analyses]. *See also* Application of the Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481, 5487 (2001) (to be codified at 29 C.F.R. pt. 552) (proposed Jan. 19, 2001) [hereinafter Application of the FLSA to Domestic Service]. Between 1975 and 1999 the number of Medicare-certified home care agencies increased three-fold. *Id.* 66 Fed. Reg. at 5483.

40% in the mid-1990s.[12] As of 1999, for-profit companies employed 62% of home health care aides.[13]

The workers employed by these agencies perform demanding personal, housekeeping and medical services for multiple households. Domestic service is their vocation and it provides them with essential family income. Agency-employed home care workers are not within the narrow class that Congress intended to exclude from the 1974 extension of FLSA coverage.

A. Agency home care work is a bread-winning vocation.

Domestic service is the primary vocation of the workers employed by home care agencies. Agency employees typically serve multiple households and do not know their clients before being assigned to them.[14] On average, each agency employee provides home care services to five or more house-

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[12] *See* Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 12 (for-profit ownership of home care agencies increased from 6 % in 1980 to 43% in 1995); Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483 (unaffiliated for-profit agencies had over 40% share of market by 2000).

[13] Rhonda J. V. Montgomery et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45:5 Gerentologist 593, 596 (2005).

[14] Bureau of Labor Statistics ("BLS"), U.S. Department of Labor, *Occupational Outlook Handbook* 2006-2007 (available at http://www.bls.gov/oco/home.htm) (Personal and Home Care Aides) (most home care workers work with multiple clients, often visiting four to five on the same day); Jane Tilly & Joshua M. Wiener, *Consumer-Directed Home Care and Community Services: Policy Issues*, Occasional Paper No. 44, at 11-12 (The Urban Institute: 2001) (available at http://www.urban.org/publications/310065.html) (only 7% of California agency home care workers knew their client before they began providing services, as compared to three-quarters of individual providers).

holds in an eight-hour work day.[15] This stands in marked contrast to the ad hoc single-household employment that Congress intended to exclude from the 1974 expansion of FLSA coverage, through which companions typically sat with a single relative or friend.[16]

Home care work is generally full-time or close to it. Thus, in 1999, home care employees worked an average of 29-32 hours per week, not including time spent traveling between clients.[17] Travel time can be substantial given that home care workers "often visit four or five clients on the same day," and they "may spend a good portion of the working day traveling from one client to another."[18]

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[15] National Association for Home Care and Hospice, *Basic Statistics about Home Care*, Table 15 (2001) (available at http://www.nahc.org/consumer/hcstats.html); National Association for Home Care and Hospice, *Basic Statistics about Home Care*, Table 14 (2004) (available at http://www.nahc.org/04HC_stats.pdf).

[16] Studies of California home care workers who are employed by individual households rather than agencies show that close to two-thirds of household-employed individuals are related to the recipient of home care services and three-quarters knew the recipient before they began providing services. Michael R. Cousineau, *Providing Health Insurance to IHSS Providers (Home Care Workers) in Los Angeles County: Report to the California HealthCare Foundation* 11 (2000) (available at http://www.chcf.org/documents/insurance/ihss.pdf); Candace Howes, *Upgrading California's Home Care Workforce: The Impact of Political Action and Unionization* 94 (Univ. of Cal. Institute for Labor and Employment: 2004) (available at http://repositories.cdlib.org/ile/scl2004/03/); Tilly & Wiener, *supra* note 14, at 11-12.

[17] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483 (citing BLS National Current Employment Statistics). Some researchers report higher averages. *See, e.g.*, Yoshiko Yamada, *Profile of Home Care Aides, Nursing Home Aides, and Hospital Aides: Historical Changes and Data Recommendations*, 42:2 Gerontologist 199, 202 (2002) (reporting 34 hours usually worked per week).

[18] Bureau of Labor Statistics, *supra* note 14 (Personal and Home Care Aides). *See also id.* (Nursing, Psychiatric and Home Health Aides).

Even without counting travel time, a majority of home care aides work more than 35 hours per week.[19] Recent studies establish that 34-46% of home care workers work full-time year-round, and an additional 12-19% work full-time for part of the year.[20] The Department of Labor itself found that "[c]urrent data suggest that many workers in the home care industry are now employed in their primary occupation."[21] In contrast, most household-employed home care workers work for a single client,[22] and work less than half-time.[23]

Home care workers are two to three times more likely than other workers to be single heads of households.[24] Forty

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[19] H. Stephen Kaye et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25:4 Health Affairs 1113, 1118 (2006).

[20] Montgomery et al., *supra* note 13, at 595, 597; Yamada, *supra* note 17, at 202.

[21] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483. The trend of increased agency employment has been accompanied by an increase in these full-time numbers. *See* Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16:5 Home Health Care Management & Practice 339, 340 (2004) (citing statistics that percentage of full-time home care workers rose from 29% to 46% in decade between late 1980s and late 1990s).

[22] Household-employed individuals in California serve an average of 1.4 clients while agency workers average 4 clients. Tilly & Wiener, *supra* note 14, at 12-13.

[23] A study of Los Angeles home care workers employed directly by households determined that approximately one-third worked less than 10 hours average per week and another one-third less than 20. Cousineau, *supra* note 16, at 11. Another study found an average of less than 25 hours per week among household-employed home care workers in Los Angeles and San Francisco counties. Howes, *supra* note 16, at 94.

[24] William J. Scanlon (Director, Health Care Issues, General Accounting Office), *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony before the Senate Committee on Health, Education, Labor and Pensions*, GAO-01-750T, at 22 (released May 17, 2001) (available at http://www.gao.gov/new.items/d01750t.pdf).

percent have children younger than 18.[25] The inadequacy of the wages they earn, *see infra* p. 25, means that the families they support often live below the poverty level and rely on public benefits programs for support.[26]

B. Agency home care work involves the type of domestic work that Congress intended to cover.

The work performed by agency home care workers is the type of work Congress intended the FLSA to cover. Agency-employed home care workers provide care and assistance to seriously disabled individuals. The level of services required by such individuals means that keeping clients company represents a negligible portion of the services provided by agency-employed home care workers. As the Department of Labor has acknowledged, "[t]hese workers perform a variety of housekeeping, personal care, and medical duties for individuals who need assistance with activities of daily living to enable them to remain in their homes."[27]

The work is very demanding. "[I]ndividuals treated as exempt in providing companionship services may now perform duties such as medication management, taking vital signs (pulse, temperature, respiration), routine skin and back care, and assistance with exercise and the performance of simple procedures as an extension of physical therapy ser-

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[25] Yamada, *supra* note 17, at 200-01.

[26] One in five home health care aides has income below the poverty level. Scanlon, *supra* note 24, at 13; Yamada, *supra* note 17, at 202-03. 35-40% of families headed by home health care and nursing home aides are in poverty, and 30-35% receive food stamps. Scanlon, *supra* note 24, at 22. Home health care aides are twice as likely as other workers to be receiving food stamps and Medicaid and to lack health insurance. *Id.* at 13.

[27] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483. *See also id.* at 5484 (home care workers who perform medical duties "are not acting simply as elder sitters or as babysitters watching over their charge").

vice."[28] They may also have responsibility to "keep patients' rooms neat; and help patients to move from bed, bathe, dress, and groom," and "[o]ccasionally, they change nonsterile dressings, give massages and alcohol rubs, or assist with braces and artificial limbs. Experienced home health aides also may assist with medical equipment such as ventilators, which help patients breathe."[29]

While home care aides have fewer health care-related responsibilities than do home health aides, their housekeeping and personal care responsibilities are still demanding, requiring them to "clean clients' houses, do laundry, and change bed linens[,] . . . plan meals (including special diets), shop for food, and cook[,] . . . help clients get out of bed, bathe, dress, and groom[,] . . . [and] accompany clients to doctors' appointments or on other errands."[30] Duties also typically include assistance with "toileting, bathing, eating, and transferring" their clients.[31]

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[28] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5484.

[29] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides). A federal government report gave the following estimates regarding the percentage of home health care clients requiring assistance with various activities: bathing or showering, 53%; dressing, 46%; transferring to or from a bed or chair, 30%; and toileting, 23%. Wan He et al., *65+ in the United States: 2005*, at 67 (U.S. Dep't Health & Human Servs. & U.S. Census Bureau: Dec. 2005) (available at http://www.census.gov/prod/2006pubs/p23-209.pdf).

[30] Bureau of Labor Statistics, *supra* note 14 (Personal and Home Care Aides).

[31] Paraprofessional Healthcare Institute, *The Right People for the Job*, 1:1 Workforce Tools 1, 2 (Fall 2002) (available at http://www.paraprofessional.org/publications/WorkforceTools_Vol1No1.pdf) (description of work developed under subcontract to MEDSTAT Group, Inc. under contract with federal government's Centers for Medicare & Medicaid Services). *See also* State Medicaid Manual, CMS Pub. 45 § 4480

The nature of the work takes a toll on the employees. Home health providers have 280.5 occupational injuries and illnesses involving days away from work per 10,000 full-time workers as compared to 188.3 for all private industries.[32] The injury rate in home care is worsened by the fact that, unlike in a nursing home, home care aides must lift and transfer clients without the help of a mechanical lifting device or the assistance of co-workers.[33] Home care workers often suffer emotional abuse from mentally impaired clients who may have severe behavioral problems.[34] Homes may be "untidy and depressing," and clients may be "angry, abusive, depressed, or otherwise difficult."[35]

C. Congress intended the exemption to apply to individual households, not to agency employers.

The legislative history of the 1974 amendments shows that Congress was concerned about the increased demands that FLSA compliance would place upon individual households. Opponents of the extension complained about "bring[ing] the Federal bureaucracy into the kitchen of the American house-

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(available at http://www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=99&sortByDID=1&sortOrder=ascending&itemID=CMS021927&intNumPerPage=10) ("Personal care services" include assisting disabled individuals with "eating, bathing, dressing, toileting, transferring, and maintaining continence," as well as "personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management.").

[32] Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 10, 109.

[33] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides).

[34] UCSF Health Workforce Studies, *supra* note 10, at 33.

[35] Bureau of Labor Statistics, *supra* note 14 (Personal and Home Care Aides). *See also id.* (Nursing, Psychiatric and Home Health Aides); Jane Gross, *New Options (and Risks) in Home Care for Elderly*, N.Y. Times, Mar. 1, 2007.

wife," and cited Secretary of Labor Peter Brennan's prediction that "homemakers" would be unable to keep accurate records.[36]

Unlike individual households, however, agencies are traditional employers, with up to hundreds of thousands of home care employees serving clients in multiple locations.[37] Agencies routinely maintain employment records and comply with a multitude of labor and employment laws. The exemption Congress adopted was based on a concern about the burdens of such requirements, and that concern is simply inapplicable to agency employers.

Federal employment laws frequently distinguish households from other employers. The Social Security Act, for example, does not permit agencies to take advantage of special provisions that exempt household-employed domestic workers, exclude non-cash remuneration from wages, and permit household employers to round the amount of wages.

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[36] S. Rep. No. 93-300, at 121 (1973) (Minority Views). *See also* H.R. Rep. No. 93-232, at 95 (1973) (Minority Views) (questioning wisdom of subjecting housewives to criminal penalties for failing to keep required records); 119 Cong. Rec. 18,155 (1973) (Representative Erlenborn) (complaining about imposition of record-keeping requirements upon housewives who employ workers for less than a day per week); *id.* (Senator Fannin) ("I just cannot imagine the housewife struggling with the paper work which would be required."); *id.* at 24,385 (Senator Beall) (arguing that expecting housewives to keep FLSA records is unrealistic); *id.* at 24,798 (Senator Dominick) (questioning why government should require private individuals to maintain records).

[37] *See* Gross, *supra* note 35; *Gentiva At a Glance*, http://www.gentiva.com/about/AtAGlance.asp; *About TLC Health Care Services*, http://www.tlcathome.com/AboutUs/tabid/52/Default.aspx; *Press Release: The Accredited Family of Home Care Services celebrates 25 years of excellence* (Apr. 14, 2005) (available at http://www.accreditednursing.com/pdf/Press%20Release%20E%20Format.pdf; *Addus HealthCare Services: Company Profile*, http://www.addus.com; *Our History and Services*, http://www.interimhealthcare.com/about/staffingstory.aspx.

See Respondent's Br. at 19-20.[38] Similarly, the National Labor Relations Act's exclusion of persons employed "in the domestic service of any family or person at his home" from its definition of "employee," 29 U.S.C. § 152(3), does not apply to domestic workers employed by agencies. *See Ankh Services, Inc.*, 243 NLRB 478, 480 (1979). And the regulation exempting certain employers of domestic workers from the Occupational Safety and Health Act applies only to "individuals who, in their own residences, privately employ persons" who perform certain domestic tasks. 29 C.F.R. § 1975.6. Limiting the companionship exemption to employees of households is consistent with this pattern of federal employment regulation.

III. AFFIRMING THE SECOND CIRCUIT'S DECISION WILL NOT PRODUCE THE DIRE CONSEQUENCES PREDICTED BY PETITIONERS AND *AMICI*.

Petitioners and *amici* warn that FLSA coverage of agency-employed home care workers will result in increased costs and require agencies to reduce aides' overtime hours, thus disrupting continuity of care and reducing the services available to clients. Those claims are unfounded and resemble arguments that were unsuccessfully advanced in opposition to the 1974 FLSA amendments.

The actual experience in numerous states where laws already require third-party employers of home care workers to pay a minimum wage (in some cases, higher than the

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[38] Even before the Social Security Act was amended in 1950 to remove the exemption of domestic workers and to add these provisions, the exemption was construed to apply only to domestics employed by households. *See* 26 C.F.R. § 403.809 (1949) ("Services of a household nature performed by an employee in or about the private home of the person by whom he is employed, . . . are included within the above exception.").

federal minimum) and premium pay for overtime belies the unsupported predictions of doom. Many state minimum wage and overtime laws have no companionship exemption at all,[39] or exempt only live-in companions.[40] Others exempt companions only if they are employed directly by a household or family member.[41] Neither Petitioners nor *amici* offer

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[39] *See, e.g.*, 820 Ill. Comp. Stat. 105/3(d), 105/4(a)(1), 105/4a and Ill. Admin. Code tit. 56, § 210.110 (exempting individuals employed in domestic service but defining category to exclude "person whose primary duty is to be a companion for individual(s) who are aged or infirm"); Kan. Stat. Ann. §§ 44-1202(e)(2), 44-1203, 44-1204 and Kan. Admin. Regs. § 49-30-1(h) (exempting employees providing domestic service, defined to include "an individual employed by an owner or tenant in a private home to clean, repair or maintain the private home or the property on which the private home is located, but does not include an individual employed by a person contracting to perform the service"); Minn. Stat. §§ 177.23(11), 177.24, 177.25 (providing only that "nighttime" hours worked by employee providing "companionship services" are not hours worked if the employee is merely available to perform duties but does not actually do so). *See also* Md. Code Ann., Lab. & Empl. §§ 3-413, 3-415 (minimum wage and overtime law with no relevant exceptions); N.J. Stat. Ann. § 34:11-56a4 (same); W. Va. Code §§ 21-5C-1 *et seq.* (same); Mass. Gen. Laws ch. 151, §§ 1-3 (same) and Opinion Letter MW-2002-020, Mass. Dept. of Labor, Div. of Occupational Safety (July 19, 2002), *available at* www.mass.gov/dos/mw_docs/mw-2002-020.htm (stating that home health aides covered); Neb. Rev. Stat. § 48-1201 *et seq.* (minimum wage laws with no relevant exceptions); S.D. Codified Laws § 60-11-3 (same).

[40] *See, e.g.*, Mich. Comp. Laws §§ 408.383, 408.384, 408.394(2)(a) (covering all employees providing companionship services except "live-in domestic service employee"); Nev. Rev. Stat. §§ 608.018, 608.250 (exempting only domestic servants that "reside in the household where they work").

[41] *See, e.g.*, Alaska Stat. §§ 23.10.055(4), 23.10.060, 23.10.065 and Alaska Admin. Code tit. 8, § 15.910(a)(6) (exempting persons "employed in or about a private home of a person by whom the individual is employed"); 7 Colo. Code Regs. § 1103-1(1) to -1(6) (exempting "companions, casual babysitters, and domestic employees employed by households or family members to perform duties in private residences"); Haw. Rev. Stat. § 387-1 to -3 (exempting individuals employed "in domestic

any evidence that such state laws have resulted in financial ruin to agencies or the disruption of continuous care to severely disabled individuals.

Opponents of the 1974 amendments warned that the extension of coverage to domestic workers would make their labor too costly and reduce the demand for their services.[42] But the 1974 Congress rejected these admonitions in favor of providing domestic workers with the same protections and minimum standards that applied to other workers.

As we now show, Petitioners' and *amici*'s claims about the consequences of coverage are unsupported, and it is in fact

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service in or about the home of the individual's employer"); Mont. Code Ann. §§ 39-3-404, 39-3-405, 39-3-406 (exempting employees providing companionship services only "when the person providing the service is employed directly by a family member or an individual who is a legal guardian"); 43 Pa. Cons. Stat. §§ 333.104, 333.105(a)(2) and 34 Pa. Code § 231.1(b) (exempting "domestic service in or about the private home of the employer," and defining such service not to include work for an "employer in the employer's pursuit of a trade, occupation, profession, enterprise or vocation"); Wash. Rev. Code §§ 49.46.010(5)(b), 49.46.010(5)(j), 49.46.020, 49.46.130 (exempting "[a]ny individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession" and "[a]ny individual whose duties require that he or she reside or sleep at the place of his or her employment"); Wis. Admin. Code DWD §§ 272.03, 272.06, 247.015, 274.03 (exempting from minimum wage only "casual employment in or around a home in work usual to the home of the employer, and not in connection with or part of the business, trade or profession of the employer" for not more than 15 hours per week, and "companions in private homes," defined as "[p]ersons who reside in the employer's household for the purpose of companionship and who spend less than 15 hours per week on general household work"; and exempting from the overtime law only "[e]mployees employed in domestic service in a household by a household").

[42] *See, e.g.*, S. Rep. No. 93-300, at 121 (1973) (Minority Views) (quoting Secretary of Labor Peter Brennan's concern that "the housewife can substitute her labor" for a domestic employee's).

the continued undervaluing of home care aides' work—and the resulting labor shortage—that presents the greatest concern to society.

A. Predictions that FLSA coverage will harm the quality and availability of care are speculative and untrue.

The predictions of harm by Petitioners and their supporting *amici* rest largely upon unsupported conjecture, not the realities of the current home care market. And the purported concern about the affordability of home care services is unconvincing coming from agencies that earn profits and pay home care workers significantly less than the amount they receive from the government to provide such services. A recent study by UCSF researchers found that agency reimbursement rates under federal Medicaid programs exceeded those for household-employed home care workers by an average of 27-39% ($13 per hour as compared to $8-9 per hour).[43] Nonetheless, home care employees of agencies "ultimately earned an hourly wage a little over the Federal minimum wage" and "[h]ealth care and other benefits were generally not provided."[44] Thus, these agencies are in a better position than households to absorb additional costs without reducing services or passing on costs to consumers or the government.

Two additional factors undermine assertions that overtime costs will burden agencies and force home care agencies to assign multiple workers to large numbers of clients. First, clients generally receive less than 40 hours of service per week. Most applicable state Medicaid programs place limits on the number of hours that they will fund, with the limit

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[43] Allen J. LeBlanc et al., *State Medicaid Programs Offering Personal Care Services*, 22:4 Health Care Financing Rev. 155, 165 (2001).

[44] LeBlanc et al., *supra* note 43, at 165.

averaging 4.8 hours per day.[45] Those states that have not adopted hourly limits tend to impose cost caps upon clients which indirectly limit the hours of service.[46] Petitioners and *amici* have not offered any evidence that, despite these limits, substantial numbers of clients in jurisdictions other than New York receive more than forty hours of services per week. Second, to the extent agency-employed home care aides are working more than 40 hours per week, evidence suggests it is in order to serve multiple clients, not a single individual.[47] Thus, the number of clients requiring round-the-clock care is unlikely to be large enough to support the predictions of financial disaster.[48]

Finally, government sources pay three-quarters of all home health care spending,[49] and provide extensive funding for

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[45] LeBlanc et al., *supra* note 43, at 162. Of the fifteen states with service limits, seven do not permit the limits to be exceeded and eight allow exceptions with prior authorization. *See* General Accounting Office, *Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services*, GAO/HEHS-99-101, at 23, 75-76 (May 1999).

[46] LeBlanc et al., *supra* note 43, at 162.

[47] National Association for Home Care and Hospice, *Basic Statistics about Home Care*, Table 15 (2001) (available at http://www.nahc.org/consumer/hcstats.html)(agency employees in the 25th percentile of visits per eight-hour day served 4.2 clients daily.)

[48] In any event, there is a separate overtime exemption that covers live-in aides. 29 U.S.C. §213(b)(21).

[49] U.S. Dep't of Health and Human Servs., Centers for Medicare and Medicaid Services, *National Health Expenditures by Type of Service and Source of Funds*, CY 1960-2005 (2005 figures can be found at www.cms.hhs.gov/NationalHealthExpendData/downloads/nhe2005.zip); The Caregiving Project, *Caregiving in America* 34 (Schmieding Foundation) (available at http://www.schmiedingcenter.org/pdf/caregiving_in_america.pdf) (citing Cynthia Smith et al., *National Health Spending in 2004*, 25:1 Health Affairs 186-96 (2006)). That figure is for home health care only, and does not include personal care services. The remainder of the funding comes from the following sources: 12% private health

approved personal assistance in the activities of daily living for elderly and disabled individuals.[50] Thus, governments can avoid or mitigate any negative ramifications of FLSA coverage by adjusting reimbursement rates to enable providers to comply with the FLSA.[51]

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insurance, 11.3% out-of-pocket, and 2.3% other private. The Caregiving Project, *supra*, at 34.

[50] LeBlanc et al., *supra* note 43, at 155. The Department of Labor has found that Medicare and Medicaid contribute 55% of the money paid to freestanding agencies, philanthropy accounts for 12%, private health insurance 11%, and out-of-pocket funds just 22%. Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483. Other federal programs that fund home care include Title XX Social Security block grants; Title III Older American Act funds; the Department of Veterans Affairs Aid and Attendance Program; and Title II, Section 203 of the Ticket to Work and Work Incentives Improvement Act of 1999. LeBlanc et al., *supra* note 43, at 156. State and local governments also contribute substantially and are increasingly turning to alternative, non-Medicaid sources of funding for in-home care. UCSF Health Workforce Studies, *supra* note 10, at 57.

[51] 42 U.S.C. § 1396a(a)(30)(A) requires state Medicaid plans to "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Accordingly, New York, for example, makes the minimum wage a factor to be considered in setting personal care services reimbursement rates, and permits providers to request revisions of their rates for new or unanticipated costs beyond their control. N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(6)(ii)(d); *id.*, tit. 18, § 505.14(h)(7)(iii)(c)(2). In addition, increased compensation costs due to FLSA coverage could be addressed through wage pass-through legislation, a strategy employed by a number of States already. *See* Dorie Seavey & Vera Salter, *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants* 7-8 (American Ass'n of Retired Persons: 2006) (available at http://assets.aarp.org/rgcenter/il/2006_18_care.pdf).

B. FLSA coverage will help increase and stabilize the labor supply to meet the growing demand for home care services.

Congress extended the FLSA to domestic employment in the belief that improving labor standards would attract more workers to the occupation. Thus, Senate Committee Report No. 93-300 explained:

> It is also important to note that even in a period of high unemployment such as exists today, the demand for household workers is not being met. Bringing domestics under the Fair Labor Standards Act would not only assure them a minimum wage but would enhance their status in the community. It is expected that the supply of domestic workers will increase as their pay and working conditions improve. Minimum wages should serve to attract skilled workers to these jobs at a time when the need for skilled domestic employees is greatly increasing.[52]

Congressional supporters of the extension of coverage endorsed this rationale. Senator Williams noted that, "[d]uring the past 13 years, the number of domestic service employees in the country has been reduced by half at a time when the demand for domestic services rose by 33 percent," and warned, "[i]f these trends continue, a much-demanded occupation will have been reduced to near oblivion."[53] Other lawmakers highlighted the relationship between extending

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[52] S. Rep. No. 93-300, at 21 (1973). *See also* S. Rep. No. 93-690, at 19 (1974) (same); 119 Cong. Rec. 24,360 (1973) ("[I]n many areas of the country, including New York, . . . there are not enough workers willing to engage in domestic employment to meet the demand. Bringing minimum wage coverage to domestics will be one step, and a very important step, to bringing some measure of dignity to this type of employment and thus serve to attract a more qualified and more stable workforce to the job.").

[53] 119 Cong. Rec. 24,799 (1973).

FLSA coverage and restoring the labor pool.[54] Senator Javits stated, "The more the job becomes dignified and recognized

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[54] *See, e.g.,* 119 Cong. Rec. 24,802 (1973) (Senator Javits) "[N]o wonder we have a pool of people who do not want the jobs; they are not paid adequately. The argument is strong for this kind of measure in the elementary sense of restoring the pool of labor for the work. . . . I believe we will have more and better domestic workers with this kind of policy than otherwise."); 119 Cong. Rec. 24,828 (1973) (Senator Humphrey) ("[I]n the last decade, over 70,000 persons have left domestic work, precisely because the pay is so low. . . . [W]e are not going to increase the number of domestic workers, unless and until the domestic can be assured some kind of fair compensation for her work."); 119 Cong. Rec. 18,347 (1973) (Representative Green) ("This is a group whose numbers are shrinking drastically as demand for workers is increasing. . . . [W]e talk about it being difficult to get domestic workers. Until we are willing and able to pay a living wage, until we the Congress, are willing to bring them under the minimum wage, the problem will remain."); 119 Cong. Rec. 30,270 (1973) (Representative Jordan) ("Employment in the field of domestic work has been declining for some time, largely because of the poor wages and the lack of advancement. Applying minimum wage coverage to domestic workers would give some semblance of dignity to this menial labor."); 119 Cong. Rec. 30,281 (1973) (Representative Metcalfe) ("The demand for domestic workers is increasing at a time when there is a shortage of such workers. Although competent domestic help is in high demand the pay continues to be grossly inadequate."); 119 Cong. Rec. 30,271 (1973) (Representative Mitchell) (citing drop in supply of domestic workers by one million in past decade and attributing same to inadequate wage); 119 Cong. Rec. 18,380 (1973) (Representative Mink) (noting "the number of domestics employed in households across the United States declined by 70,000 between 1960 and 1970" and attributing that drop to low pay in the industry; "By increasing the pay, we should make these positions more attractive and add new employment opportunities."); 120 Cong. Rec. 5270 (1974) (Representative Williams) ("In a little over 10 years the work force employed in domestic service has been cut in half during a period when the demand and needed for domestic workers has increased by one-third. Part of that, I am sure, is the fact of the low wages that do prevail and the lack of coverage. . . . [I]f the employment is given the dignity it deserves, by coverage under the Fair Labor Standards Act, maybe those working women and those who need help in their homes will have an adequate supply of those who need the work and want the

as honorable employment, such as any other employment—working in a factory or working here—the better it will be from the point of view of getting that kind of service, which Americans so urgently need."[55]

Similarly, today, groups representing elderly and disabled individuals have filed *amicus* briefs supporting FLSA coverage of agency home care workers in order to stabilize and strengthen the labor pool that delivers critical services to elderly and disabled individuals. This support makes sense in light of the well-documented shortage of home care workers throughout the United States.[56]

Demographic changes, including longer life expectancy, will intensify this labor shortage in the coming decades. Individuals aged 65 years and older will increase from 12%

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work but cannot afford to go to work when the wages are as low as they are today.").

[55] 118 Cong. Rec. 24,705 (1972).

[56] *See, e.g.*, Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 1-2; Susan Harmuth & Susan Dyson, *Results of the 2005 National Survey of State Initiatives on the Long-Term Care Direct-Care Workforce* 6 (Nat'l Clearinghouse on the Direct Care Workforce & Direct Care Workers Ass'n of N.C.: 2005) (reporting that 29 states considered long-term direct care vacancies to be a "serious" workforce issue) (available at http://www.directcareclearinghouse.org/download/2005_Nat_Survey_State_Initiatives.pdf); LeBlanc et al., *supra* note 43, at 167 (reporting that state officials in 61% of states "reported difficulties finding qualified personal care providers"); Scanlon, *supra* note 24, at 11; Stone, *supra* note 21 at 339, 344 (reporting that 37 states considered recruitment and retention of home care aides to be priority concerns); Robyn I. Stone & Joshua M. Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis* 3-4, 9, 12-16 (The Urban Institute & American Ass'n of Homes and Servs. for the Aging: Oct. 2001) (available at http://www.rwjf.org/files/ research/WhoWillCareforUsReport.pdf).

of the population today to 21% by 2050,[57] and those who are 85 and older will double by 2030 and triple or quadruple by 2040.[58] These trends will produce significant increases in the demand for home care services, with the number of elderly individuals in need of personal assistance services projected to rise from 13 million in 2000 to 27 million by 2050, and working-age individuals in need of assistance due to disability predicted to increase from 5 million to 8 million during the same time period.[59]

As a result, employment of home health aides is projected to increase by 56% just in the decade between 2004 and 2014, making it the fastest growing occupation in the nation; employment of personal and home care aides is expected to grow by 41% during the same time period, making it tenth on that list.[60] As of 2004, federal statistics documented 701,000 personal home care aides and 624,000 home health care aides.[61] By 2014, the Bureau of Labor Statistics projects a

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[57] UCSF Health Workforce Studies, *supra* note 10, at 13 (citing Congressional Budget Office, *The Looming Budgetary Impact of Society's Aging* (2002)).

[58] Nora Super, National Health Policy Forum Background Paper, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand* 2 (Jan. 23, 2002) (available at http://www.nhpf.org/pdfs_bp/BP_Caregivers_1-02.pdf) (2040 projections); Scanlon, *supra* note 24, at 9 (2030 projections).

[59] Kaye, *supra* note 19, at 1113 (elderly estimates); U.S. Dep't Health and Human Servs and U.S. Dep't of Labor, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation* 5 (2003) (available at http://www.pascenter.org/publications/publication_home.php?id=61) (working-age disabled individuals).

[60] Bureau of Labor Statistics, *supra* note 14 (Tomorrow's Jobs); Daniel E. Hecker, *Occupational Employment Projects to 2014*, Monthly Labor Rev., Nov. 2005, at 75 (citing BLS statistics).

[61] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Hecker, *supra* note 60, at 75 (citing BLS statistics). These statistics may underestimate the

need for 974,000 home health aides and 988,000 personal and home care aides.[62]

However, the demographics of those who provide the services are not keeping up with those in need of them. While the population over age 85 will double in the next 30 years, the number of persons in the demographic of most home care workers will increase by just 9%.[63] The General Accounting Office has developed a calculation called the "elderly support ratio," which represents the ratio of women aged 20-54 (the gender and age group currently providing the vast majority of care) to persons aged 85 and over. In 2000, that ratio was 16:1. The ratio will drop to 12:1 by 2010, 9:1 by 2030, and 6:1 by 2040.[64] Nor is that gap likely to be filled by informal, uncompensated care; the number of potential family caregivers for each person needing care is projected to decrease from 11 in 1990 to 4 in 2050.[65]

The current labor shortage is largely attributable to the lack of competitive wages and the demanding nature of the

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actual number of home health care workers significantly, by undercounting individuals hired directly by households. Stone, *supra* note 21, at 340.

[62] Hecker, *supra* note 60, at 75 (citing BLS statistics).

[63] Scanlon, *supra* note 24, at 9. The total working age population (persons aged 18 to 64) will grow by just 16% during this time period. *Id.*

[64] Scanlon, *supra* note 24, at 9; UCSF Health Workforce Studies, *supra* note10, at 34 http://www.futurehealth.ucsf.edu/geria/062404-Geria%20 Final.pdf) (citing United States General Accounting Office, *GAO analysis of U.S. Census Bureau projections of total resident population*, Middle Series (Dec. 1999)). The ratio of the entire working age population to the population over 85 will go from 39.5 workers per elderly person in 2000 to 22.1 in 2030 and 14.8 in 2040. Scanlon, *supra* note 24, at 9. These figures assume relatively high immigration, one million net annually, through 2030. UCSF Health Workforce Studies, *supra* note 10, at 35.

[65] Super, *supra* note 58, at 3 (citing National Family Caregivers Association, Family Caregiving Statistics, Kensington, Maryland, 2000).

work.[66] The Bureau of Labor Statistics found that the earnings of home care workers "remain among the lowest in the service industry," with a 1998 mean annual income for home health aides of $16,250 and for home care aides of $14,920.[67] In 1998, one in ten home care aides earned less than $12,300 per year, below the poverty level for a family of three.[68]

Many potential home care workers have the option to choose jobs that are better paying or less demanding than home care, and those that do choose home care work turn over rapidly.[69] Turnover, attributable to low wages and the physically and emotionally demanding nature of the work,[70] has been estimated at 40-100% per year by agencies interviewed for a recent news article and at 12-60% by the United States Department for Health and Human Services.[71] This

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[66] General Accounting Office, *supra* note 45, at 35.

[67] Application of the FLSA to Domestic Service, *supra* note 11, 66 Fed. Reg. at 5483 (citing BLS Occupational Employment Statistics survey).

[68] *Id.*

[69] Scanlon, *supra* note 24, at 12; Seavey & Salter, *supra* note 51, at 1-2. In 2000, file clerks earned more than home health aides and significantly more than personal and home care aides. Paraprofessional Healthcare Institute, *Long-Term Care Financing and the Long-Term Care Workforce Crisis: Causes and Solutions* 19 (Citizens for Long-Term Care: 2003) (available at http://www.paraprofessional.org/publications/CLTC_doc_rev1.pdf) (citing BLS data).

[70] Bureau of Labor Statistics, *supra* note 14 (Nursing, Psychiatric and Home Health Aides; Personal and Home Care Aides); Yamada, *supra* note 17, at 204.

[71] Gross, *supra* note 35; Nat'l Ctr. for Health Workforce Analyses, *supra* note 11, at 14 (citing R. Stone, *Frontline Workers in Long-Term Care: A Background Paper* (Institute for the Future of Aging Services: 2001)); Seavey & Salter, supra note 51, at 2 (40-50% annual turnover); Super, *supra* note 58, at 4 (national turnover of 28%); New York Association of Homes & Services for the Aging, *The Staffing Crisis in New York's Continuing Care System: A Comprehensive Analysis and*

turnover is expensive, costing approximately $3,362 each time a worker needs to be replaced.[72] It also tends to diminish the quality and continuity of patient care.[73]

This labor shortage has already produced adverse consequences for home care clients. Medicaid home care clients have filed lawsuits in federal and state court challenging home care payment rates on the ground that their inadequacy has caused a shortage of necessary services.[74] They have documented incidents where individuals in need of critical services have been trapped for hours in bed or in a bathroom, or without food or water, because of the unavailability of

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Recommendations 17 (2000) (available at http://www.nyahsa.org/docs/Staff.pdf) (40-60% turnover in one year and 80-90% in 2 years).

[72] Stone, *supra* note 21, at 341. Stone points out that this figure does not even take into account lost productivity during time that new workers are trained and gain experience, or the attrition between initial hiring and placement. *Id.*

[73] *Id.*

[74] Seavey & Salter, *supra* note 51, at 14-17. The legal claims in these actions have been based on requirements of the Medicaid statute and federal prohibitions against discrimination based on disability. Two cases have resulted in settlements: a federal lawsuit that prompted Mississippi to agree to increase payments to personal care attendants by $0.50 per hour and to seek funding from the legislature for additional pay increases, and a state court case that caused New Hampshire to agree to establish a new rate-setting methodology based on the average cost of providers. *Id.* A California lawsuit was dismissed on the ground that the Medicaid statute does not confer individually enforceable rights and that the state was not violating disability law. *Sanchez v. Johnson*, 416 F.3d 1051, 1061, 1067-68 (9th Cir. 2005). A district court order, requiring Arizona to offer a rate of pay that guarantees that clients will receive the services for which they qualify, is on appeal to the Ninth Circuit. *Ball v. Biedess*, 2004 WL 2566262 **6-7 (Aug. 13, 2004), *on appeal sub nom. Ball v. Rodgers*. A class has been certified and a motion to dismiss denied in a pending Wisconsin case. *See Nelson v. Milwaukee County*, 2006 WL 290510, No. 04-C-193 (E.D. Wis. Feb. 7, 2006); *Bzdawka v. Milwaukee County*, 238 F.R.D. 469 (E.D. Wis. Oct. 13, 2006).

home care aides. *See, e.g., Ball*, 2004 WL 2566262 at *4 & n.3. The critical shortage of home care aides also "encourage[s] unnecessary and premature institutional placements among Medicaid participants."[75] Those unnecessary placements, in turn, cost the federal and state governments far more than would otherwise be spent on home care services.[76]

In sum, Petitioners and *amici* have it exactly backwards: it is the *lack* of FLSA coverage for agency-employed home care workers that threatens the quality and availability of home care services. Excluding these workers from FLSA has contributed to a widening gap between the demand for home care services and the supply of individuals who are willing to commit to such underpaid and difficult work. And as the 1974 Congress recognized, providing FLSA coverage would help to remedy this critical shortage of labor.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[75] LeBlanc et al., *supra* note 43, at 170.

[76] LeBlanc et al., *supra* note 43, at 168-69 (states spent average of $6,870 per Medicaid personal care client in 1997-98 and $19,077 per Medicaid nursing facility resident in 1997).

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IN THE

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INTEREST OF THE *AMICI CURIAE*

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amici curiae* in support of petitioners. The parties have consented to the filing of all briefs by *amici curiae*, and these consents have been filed with the Court.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

The Continuing Care Leadership Coalition ("CCLC") is a not-for-profit membership organization whose members include more than 100 not-for-profit and public organizations providing long term care services in New York State, including mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals.

The Home Care Association of New York State, Inc. ("HCA") is a not-for-profit organization that promotes home care and community services for the citizens of New York State. Most of HCA's nearly 400 provider members are non-profit and government agencies, and they serve the majority of Medicaid and Medicare recipients receiving home care services in New York State.

The Home Care Council of New York City, Inc. ("HCC") is a not-for-profit professional association of home health care providers whose members provide over $1 billion in home care services on an annual basis to more than 70,000 elderly, disabled, and frail New York City residents. Through contracts with the City of New York's Human Resources Administration, 51 of HCC's not-for-profit members provide personal care services to Medicaid-eligible New Yorkers.

The New York State Association of Health Care Providers, Inc. ("HCP") is a not-for-profit industry association of home and community-based health care providers throughout the State of New York. HCP represents approximately 500 offices of licensed home care service agencies, certified home health agencies, long term home health care programs, hospices, and related health care organizations.

All four *amici* submitted briefs to this Court in support of the Petitions for Writs of Certiorari to review the decisions rendered by the United States Court of Appeals for the Second Circuit herein. To avoid burdening the Court with possibly duplicative filings, these four associations of home

health care providers have joined their voices in this brief to present the perspective of their members, the third-party employers who bear the brunt of the Second Circuit's ruling. The continued enforceability of the third-party employer regulation is of critical importance to the members of all four associations and to their ability to continue providing services to a patient population that is largely elderly, indigent, and totally dependent on these services.

SUMMARY OF ARGUMENT

By striking down a regulation that had been in effect for thirty years, the Second Circuit improperly substituted its judgment for that of the agency charged with implementing and administering the regulation. The Court of Appeals' failure to accord the proper level of deference to the administrative agency resulted in a ruling that is already having a profound effect on the provision of home health care services in New York State and, if not reversed, will disrupt the continuity of care and negatively affect the provision of essential services to the elderly, all without improving the financial circumstances of home health workers.

ARGUMENT

I. THE FAILURE OF THE SECOND CIRCUIT TO ACCORD APPROPRIATE DEFERENCE TO AGENCY RULEMAKING HAS JEOPARDIZED THE CONTINUED PROVISION OF VITAL HOME HEALTH SERVICES

A. Judicial Deference To Agency Expertise Has Its Basis In Sound Policy, And Is Particularly Appropriate Here Where The Agency Has Repeatedly Considered The Matter

The Court of Appeals for the Second Circuit twice refused to accord deference with respect to the third-party employer regulation at 29 C.F.R. § 552.109(a): first in its July 2004

decision (Pet. App. 7a-32a), reported at 376 F.3d 118 ("*Coke I*"), and then in its opinion on remand from this Court (Pet. App. 1a-6a), reported at 462 F.3d 48 ("*Coke II*"). Despite this Court's direction that it consider an extensive Department of Labor ("DOL") memorandum addressing in detail application of the companionship exemption of Section 13(a)(15) of the Fair Labor Standards Act ("FLSA") to third-party employers,[2] the Second Circuit on remand persisted in denying the agency any deference at all, preferring its own reasoning to that of the agency. *See* Pet. App. 6a ("After reconsidering our 2004 decision in light of the DOL Memo, we find no reason to abandon the reasoning or the results reached in that decision"). That opinion flouted this Court's precedents, which have repeatedly recognized the agency's primacy on matters of policy and the interpretation of its own regulations, especially where the agency's actions have been left undisturbed by Congress for decades and where Congress has expressed no contrary intent on the matter.

Amici respectfully submit that the Second Circuit's improper substitution of its judgment for that of the agency charged by Congress with the promulgation of the regulation at issue has created the very result that sound principles of administrative law are intended to avoid. As recognized by every other court to consider (and uphold) this same regulation, including the Tenth Circuit, the regulation is based on policy concerns that are well within DOL's purview. And as *amici* will explain further in this brief, the Second Circuit's refusal to abide by these principles, even after remand from this Court, threatens a host of harmful and unnecessary consequences.

The proper application of sound deference principles is in fact illustrated in this very case, in the opinion of the District

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[2] *See* Department of Labor, Wage & Hour Advisory Memorandum, December 1, 2005 (the "DOL Memo") (Pet. App. 50a-64a).

Court.[3] In its opinion, the District Court described the "strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years. . . ." Pet. App. 46a. With respect to the level of deference owed to the DOL, the District Court explained:

> The DOL's interpretation of Section 213(a)(15) in 1975 is evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments [in 2002] shows that it still believes that these long-standing regulations are appropriate in the current home health-care environment. Despite amending Section 213(a)(15) seven times since [1974], Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate.

Pet. App. 47a.

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[3] The District Court reviewed as well the decisions of the courts that had previously considered the regulation, including the Tenth Circuit, which has twice upheld the regulation. In *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559, 562 (10th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001), the Tenth Circuit held that 29 C.F.R. § 552.109(a) is entitled to *Chevron* deference; the Court has since adhered to this holding in *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004). Another decision analyzed by the District Court herein was rendered by a district court in Oklahoma, which, in rejecting a similar attempt to terminate third-party employers' eligibility for the exemption, noted that "[p]laintiff has identified no authority, and the Court is unable to locate any, that supports this view of the companionship services exemption. In fact, the Court is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294, 1299 n.2 (N.D. Okla. 1998).

As the District Court pointed out, DOL had on at least two occasions subjected the regulation at issue to intense scrutiny, once upon its promulgation and again when consideration was given to its possible amendment. When DOL withdrew proposed amendments of Section 552.109(a) in April 2002, it did so because "'numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into question the Department's conclusion that there would be little economic impact.'" Pet. App. 42a-43a (citation omitted). DOL terminated the proposal, thereby choosing to leave the regulation in the form first adopted in 1974 and abandoning the proposed amendments published on January 19, 2001. *See* 66 Fed. Reg. 5,481 (Jan. 19, 2001). DOL made this determination in the exercise of its expertise and on the basis of the "rulemaking record as a whole." 67 Fed. Reg. 16,668 (Apr. 8, 2002).

Since the time of the District Court opinion, DOL has had occasion to focus on the regulation three more times, once when it appeared before the Second Circuit to argue the *Coke I* case, again in March 2005 when it issued an opinion letter indicating that the Wage & Hour Division has not changed the regulation or its interpretation thereof as a result of *Coke I* (*see* Op. Ltr. FLSA2005-12, 2005 WL 2086801 (Mar. 17, 2005)), and finally in December 2005 when it issued the DOL Memo. Each time, its conclusion has been the same: 29 C.F.R. § 552.109(a) is a valid and enforceable regulation, properly promulgated by DOL pursuant to its expressly conferred legislative rulemaking authority. For the Second Circuit to strike this regulation down in a "test case" that had not yet proceeded beyond the pleading stage (Pet. App. 9a-10a), not only flies in the face of established precedent, but also illustrates why judicial deference to agency expertise is appropriate.

Agencies have expertise in their fields that judges and legislators do not necessarily possess, and are generally in the

best position to determine how a proposed rule will affect the industry and the public. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984). *Chevron* explains that when Congress has not directly addressed the precise question at issue and has delegated authority to an agency to clarify a specific statutory provision, the agency's regulation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 843-44. This Court noted that it has consistently deferred to such administrative interpretations "'whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'" *Id.* at 844 (citations omitted). Given that the Second Circuit admitted on remand (Pet. App. 4a-5a) that a clear congressional intent on the matter could not be inferred, the agency's regulation warrants deference. Nor does the fact that DOL has considered alternatives undermine that deference, since, as *Chevron* further notes, "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 863-64.

The Second Circuit's decision is also remarkable for its failure to grant even the lesser deference owed under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), where this Court likewise recognized that an agency's policies are based on expertise in the field. *Id.* at 139 ("But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"); *see also United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) ("There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case . . ."); *Hanley v.*

Hand 'N Heart, LLC, Civ. Nos. 4:06cv71, 4:06cv143, 2007 WL 201088, at *13 (E.D. Va. Jan. 22, 2007) (because the court determined that the DOL's third-party employer regulation "is valid and enforceable under the *Skidmore* standard of deference . . . it was unnecessary for the Court to determine whether § 552.109(a) is a legislative or interpretive regulation") (citations omitted). In this particular instance, the Second Circuit could not know what the DOL learned from the notice-and-comment proceedings, that is, the enormous impact that the invalidation of Section 552.109(a) would have on the home health care industry.

Rather than considering DOL's extensive analysis of the legal authority and binding nature of—as well as its sound policy basis for—the regulation, the Second Circuit relied on a formalistic notion that the agency's labeling of the regulation should control,[4] giving short shrift to the fact that this

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[4] The Second Circuit in *Coke I* and *Coke II* relied principally on the placement of the regulation in a subpart entitled "Interpretations" for its theory that DOL did not intend to create a binding regulation when it promulgated 29 C.F.R. § 552.109(a). Such formalism does not, and should not, control whether or not a regulation is enforceable or subject to deference. *See Auer v. Robbins*, 519 U.S. 452, 462-63 (1997); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("[T]he framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation"). The Second Circuit offered no support for its assertion that the agency's label should control, and sound precedent is to the contrary. *See, e.g., United States Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) (agency's label of rule as interpretive does not govern whether notice and comment is required); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (same). Nor did the Second Circuit explain why, even if it were correct that DOL's use of notice and comment procedures here was "voluntary," that should deprive the rule of *Chevron* deference. Again, sound precedent is to the contrary. *See, e.g., Northwest Ecosys. Alliance v. United States Fish & Wildlife Serv.*, No. 04-35860, 2007 WL 286581, at *5 (9th Cir. Feb. 2, 2007) (expressly rejecting the contention that an agency rule issued after notice and comment rulemaking should be denied *Chevron* deference simply because the agency chose to label it a "policy statement" rather than a rule).

regulation was intended to, and did, have the force of law for more than thirty years. Home health workers, their union representatives, and home health providers have all treated the regulations as law, and governed their affairs accordingly. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (a legislative regulation is "one 'affecting individual rights and obligations'") (citation omitted); *Northwest Ecosys. Alliance*, 2007 WL 286581, at *5 ("The Alliance has presented no evidence that the DPS Policy has ever been treated (by the Service or parties presenting petitions to list species) as anything other than legally binding. We therefore hold that the DPS Policy is entitled to *Chevron* deference"). Indeed, the very longevity of a regulation has repeatedly been treated by this Court as commanding "substantial deference" even where *Chevron* does not apply. *See, e.g., Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 487 (2004).

By adhering to its original decision and improperly substituting its own judgment for that of the administrative agency charged with implementing and administering the statute in question, the Second Circuit has, as discussed in the remainder of this brief, created far-reaching consequences that it did not anticipate. This itself points up the reason for judicial deference to agency expertise. The decision of the Second Circuit, while no doubt made with the best of intentions, will have a substantial negative effect on: (i) home health providers that have relied on the DOL's regulations for the past thirty years; (ii) those in need of companionship services; and (iii) the home health workers the Court sought to benefit.

B. The Invalidation Of The Third-Party Employer Exemption Severely Undermines New York's Health Care System

This Court has frequently noted that long-standing agency interpretations are to be afforded particular deference when being reviewed by a court. *Barnhart v. Walton*, 535 U.S.

212, 219-20 (2002); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1981); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 (1969). This rule recognizes both the expertise of agencies charged with the administration of a statute and the importance of consistency in and reliance on such interpretations. *See Red Lion Broad.*, 395 U.S. at 381-82 (citing "the venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" and "[t]hirty years of consistent administrative construction" in upholding the FCC fair coverage requirement). The reliance on agency interpretations is an integral part of the administration of the FLSA, and in fact employers from whom unpaid wages are sought are provided a complete defense in such actions when they can demonstrate they acted in good faith reliance on and in compliance with an existing agency interpretation. 29 U.S.C. § 259. In the home health care setting, such reliance is of particular importance, as employers are contending with limited financial resources and attempting to maintain continuity in the care they provide to their patients—patients who often would be unable to maintain their independence without home health care.

For over thirty years, home health care agencies and their employees providing companionship services have understood that the FLSA did not require payment of an overtime premium. Thus, the DOL regulation was a clear and unequivocal fixing of private rights. *See Chrysler*, 441 U.S. at 302. Not surprisingly, despite the stay of the mandate that the Second Circuit has granted with respect to both decisions, *Coke I* and *Coke II* have caused disruption throughout the industry as providers have sought to minimize their impact if upheld. The Second Circuit's invalidation of the third-party employer exemption has directly increased expenses for financially fragile home health care agencies and is beginning

to affect other components of the health care system that rely on home health care services.

1. *Impact On The Long Term Care System*

Home health care agencies are an essential part of the long term care system, which provides a vital service to patients and families by caring for New York's older and disabled population. This system consists of various components that address the many levels of need found in this population, including skilled nursing care, home health care, coordinated chronic care, subacute care, and adult day health care. Certain organizations also provide long term care for a variety of specialty populations beyond the frail elderly that include children, people with HIV/AIDS, people with Alzheimer's Disease or dementias, the young disabled, people with traumatic brain injury, people with Huntington's disease, and the visually or hearing impaired.

Home health care agencies in New York and throughout the nation rely heavily on governmental payments that typically do not fully cover current operating costs. This contributes significantly to the fact that a substantial proportion of these providers are financially at risk.[5] Based upon the CCLC's analysis of 2004 audited financial statements for home health care agencies, nearly half (55 or 48%) of 115 certified home health care agencies and more than half (64 or 63%) of 102 long term home health care agencies in New York State are losing money. Additionally, more than half (51%) of New York State's nursing facilities, many of which sponsor home health care programs, are losing money.

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[5] Robyn Stone, *Long Term Care for the Elderly with Disabilities: Current Policy, Emerging Trends, and Implications for the Twenty-First Century* (Milbank Mem'l Fund 2000), *available at* http://www.milbank.org/reports/0008stone; *see also* BDO Seidman, LLP, *A Report on Shortfalls in Medicaid Funding for Nursing Home Care* (June 2006), *available at* http://ahca.org/brief/seidmanstudy0606.pdf.

Over the past decade, New York has cut Medicaid home care funding by an estimated $1 billion. Already the State and local administrators of the Medicaid program have had to cut back on coverage of home care services, often reducing the hours of service for which the Medicaid program will provide reimbursement. After the initial Second Circuit decision was issued in July 2004, the effort to reduce possible overtime liability led to further efforts to reduce service hours, and unless the Second Circuit decision on remand is reversed, the outlook for continued service to Medicaid-eligible patients cared for by *amici* member agencies is bleak indeed. The City of New York has most recently estimated that the Second Circuit's decision will increase the cost of its personal care program (a network of home health care agencies providing care to Medicaid recipients) by approximately $250-280 million annually. *See* Brief of *Amici Curiae* City of New York and New York State Association of Counties in Support of Petitioners, dated February 8, 2007, at 23.

If the State and local governments cannot obtain the additional Medicaid funding needed to pay provider agencies, they will face at best cash flow difficulties, and at worst, insolvency. Many home health agencies are small community-based not-for-profit organizations that operate virtually at cost; such entities will not be able to survive while State and local governments seek additional funding for their programs. The providers can seek to minimize the impact of the Second Circuit decision by reducing overtime hours, but such efforts cannot eliminate the financial impact of the decision and could lead to other unfortunate effects. Unable to afford costs that are not covered by government reimbursement, agencies are forced to decrease the amount of hours worked by home health care aides in order to remain in business and experience increased costs for the additional nurse supervision needed to oversee a greater number of aides working fewer hours. Agencies have also experienced increased costs related

to training additional numbers of home health care aides to meet patient care needs.

The decision is also obstructing the flow of health care delivery between hospitals and home health care agencies. Home health care services are an essential part of the continuum of care for patients who receive both long term and acute care services. Hospitals rely on home health agencies to receive patients that can be discharged home, rather than having patients linger in the hospital for longer than necessary. Home health care agencies are receiving complaints from hospitals on behalf of patients who are seeking long-hour home health care services about the hospitals' inability to find placement for them. The decision is thus not only creating difficulties in the continuity of care provided by home health agencies and in some instances threatening their continued existence, but could impair the ability of hospitals to discharge patients to more appropriate home and community-based settings in a timely manner. This could increase the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of 2002 financial statements from hospitals, CCLC estimates that if there were a one day increase in the length of stay for patients in New York hospitals who are discharged to home health care agencies, it would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, such increased costs would burden hospitals, the State, local governments, the federal government, and the workers' compensation system.

2. *Impact On Long Term Care Reform*

The decision below will also undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a

core element of its long term care system, New York has maintained a commitment to offering long term care services in the least restrictive setting, which it has done by supporting and encouraging the delivery of care in home and community-based settings. New York's commitment to home care is consistent with this Court's decision in *Olmstead*,[6] which found that state and public agencies must make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The varied mix of home and community-based programs available to older and disabled people has helped over 121,000 older New Yorkers continue to live in the community with the needed supports.[7]

In fact, federal and State agencies have supported programs pursuant to *Olmstead* to help patients, families and other informal caregivers take care of loved ones at home and lead more normal lives. President George W. Bush announced the New Freedom Initiative on February 1, 2003, which is aimed to encourage home and community-based care for older and disabled persons and establish grants to help States implement their plans pursuant to *Olmstead*.[8] On August 17, 2004, the U.S. Department of Health and Human Services, Center for Medicare and Medicaid Services, reconfirmed its commitment to supporting *Olmstead* through the Money Follows the

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[6] *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

[7] *See* Neil P. Benjamin, Assistant Director, Division of Health Facility Planning, New York State Dep't of Health, Attachment to Memorandum to Members of the Planning Committee and the Codes and Regulations Committee (Jan. 17, 2003) (submitted to consider use of home and community services in the development of a revised methodology to update the nursing home utilization data) (Ex. A to Brief of *Amicus Curiae* Continuing Care Leadership Coalition, Inc. in Support of Petitioners *in Long Island Care at Home, Ltd. v. Coke*, No. 04-1315 (U.S. Apr. 29, 2005)).

[8] Exec. Order No. 13217, 66 Fed Reg. 33,155 (June 18, 2001).

Person program, which emphasizes the need for a solid long term care system featuring home and community-based care.[9] In 2004, New York State created the Most Integrated Setting Coordinating Council guided by the principles set forth under the *Olmstead* decision to empower older and disabled individuals to live more independently in the community.[10] Insofar as the Second Circuit's decision will undermine and destabilize the home care infrastructure in New York, the decision is inconsistent with and detrimental to these state and federal efforts to promote and expand home and community based services.

In addition, the decision below and the resulting inevitable increase in costs for home health agencies will damage the progress the State has made in piloting innovative ways to help older and disabled individuals remain in the community[11] and its efforts to reform the long term care system for the future.[12] Together with various home and community-

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[9] Letter from Dennis Smith, Director, Center for Medicaid and State Operations, Center for Medicare and Medicaid Services, U.S. Dep't of Health & Human Services to State Medicaid Directors (Sept. 17, 2003) (submitted to State Medicaid Directors updating States on CMS' commitment to principles under *Olmstead*), *available at* http://www.cms.hhs.gov/smdl/downloads/smd091703.pdf.

[10] New York State Dep't of Health, Most Integrated Setting Coordinating Council (Aug. 2004), *available at* http://www.health.state.ny.us/nysdoh/miscc/index.html.

[11] New York State Dep't of Health, *Consumer Guide to Community-Based Long Term Care* (Apr. 2006), *available at* http://www.nyhealth.gov/health_care/medicaid/program/longterm.

[12] New York State Dep't of Health, Office of Medicaid Management, *Restructuring Long Term Care in New York State*, 21 DOH Medicaid Update 6 (June 2006), *available at* http://www.health.state.ny.us/health_care/medicaid/program/update/2006/jun2006.htm; *see also* Commission on Health Care Facilities in the 21st Century, *A Plan to Stabilize and Strengthen New York's Health Care System: Final Report* (Dec. 2006), *available at* http://www.nyhealthcarecommission.org/docs/final/commissionfinalreport.pdf.

based long term care options in New York, including New York's unique managed long term care program, New York relies on home care to complete its vision for the future of long term care in New York State.[13] In addition, the Court of Appeals decision will disrupt other components of the long term care system that allow individuals to remain in the community and that rely on home health care services, such as adult day health care, long term home health care (also known as the "nursing home without walls" program), and senior housing.

C. The Second Circuit Decision Will Reduce Access To Home Care Services For The Elderly And Infirm In Contravention Of Congressional Intent

When Congress acted in 1974 to exempt employees providing companionship services to the elderly or infirm in their homes from the wage and overtime provisions of the FLSA, it forthrightly stated that its purpose was to help ensure that such individuals could afford to obtain such services. The third-party employer regulation is entirely consistent with this legislative purpose, and invalidation of that regulation would have precisely the impact Congress sought to avoid: it would reduce access to and quality of home care services for the elderly and infirm.

1. *The Third-Party Employer Regulation Is Entitled To Deference Because It Is Not Contrary To The FLSA Or Its Legislative History*

As set forth more fully above, under the *Chevron* doctrine the reconciliation of conflicting policies and implementation

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[13] New York State Dep't of Health, *New York State Managed Long-Term Care: Final Report* (Mar. 2006), *available at* http://www.health.state.ny.us/health_care/managed_care/mltc/pdf/mltc_final_rep.pdf.

requiring special expertise is the province of agencies, not courts. *See* Point A *supra* (*citing Chevron*, 467 U.S. at 843-44); *see also Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (agency construction of a statute may not be disturbed "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent").

The third-party employer regulation warrants deference, because it constitutes the Department of Labor's reasonable accommodation of multiple policy goals. The regulation does not conflict with either the language of the statute or with the Congressional intent underpinning the legislation. To the contrary, the legislative history confirms that the agency's policy choice was consistent with Congress' intent. Congress explicitly stated its intention to exclude individuals providing companionship services from FLSA coverage (H.R. Rep. No. 93-913 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2845), because of Congressional concerns that compliance with the FLSA requirements would "increase tremendously the cost of taking care of our older people, perhaps forc[ing] into nursing homes some of them who otherwise could be taken care of perfectly well in their own homes." 118 Cong. Rec. 24,715 (July 20, 1972) (comments of Sen. Taft).

The District Court herein recognized that the exemption implements the Congressional purpose "to allow those in need of such services to be able to find such assistance at a price they can afford," and that this objective is achieved whether the service is provided by the direct hiring of an employee or through the use of an agency. *See* Pet. App. 46a-47a. Critically, even the Second Circuit acknowledged that "the FLSA has multiple purposes"—including, notably, a desire to exempt companionship services from coverage and to ensure that companionship services "remain affordable for working families"—and that the "third-party employer regulation as currently written would be consistent with some of

these purposes and inconsistent with others." Pet. App. 5a. Despite this acknowledgement that "congressional intent therefore does not lead to any definitive conclusion regarding the enforceability of 552.109(a)," however, the Second Circuit refused to defer to the agency to reconcile the tensions between the multiple policy goals of the statute. Pet. App. 5a. Instead, that court made its own choice regarding which of these policy goals should prevail. This was a clear violation of the principles set forth in *Chevron*. The Second Circuit had neither the authority nor the expertise to supplant the choice of the agency, and its error will result in significant injury to the elderly and infirm who Congress meant to shield from harm.

2. *Invalidation Of The Third-Party Employer Regulation Would Harm Those Needing Companionship Services, Who Congress Sought To Protect*

Invalidation of the third-party employer regulation would reduce the availability of companionship services for those who need them, harm patients' ability to obtain continuity of care, and hurt those elderly or infirm individuals who are not capable of acting as direct employers. Each of these effects directly contradicts the Congressional purpose underpinning the companionship exemption.

As set forth above, invalidation of the third-party employer regulation would cause a damaging disruption in the ability of the home care industry to provide services. That disruption would have a direct and dramatic impact on people who require those services, causing the greatest harm to the patients who are most in need: those whose medical needs demand extensive hours of care and who are unable to afford additional costs. Countless patients could face gaps in coverage. Pet. App. 86a ¶ 9; Pet. App. 105a-106a ¶ 8. In some cases, the inability to obtain adequate and affordable care at home would

force individuals to seek care in nursing homes (Pet. App. 105a-106a ¶ 8), a result absolutely at odds with Congress' intent in creating the FLSA's companionship exemption.

In addition, elimination of the exemption could have a powerful negative impact on the continuity of care available to home care patients. Continuity of care—that is, the provision of services consistently by the same caregivers to the same patients—is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible. 10 N.Y.C.R.R. § 766.2(a)(3). Elimination of the exemption would force home health care agencies to decrease or eliminate overtime hours to avoid overtime costs that are not covered by government reimbursements. Affidavit of Phyllis Wang, sworn to January 15, 2005 (annexed to the Motion for a Stay of the Mandate to the U.S. Court of Appeals for the Second Circuit, submitted by Long Island Care at Home, Ltd. and Maryann Osborne, dated January 17, 2005) ("Wang Aff.") ¶ 18; Pet. App. 85a ¶ 6; Pet. App. 105a-106a ¶ 8. As a result, the agencies could be compelled either to eliminate any hours of service not required by law or to assign more caregivers—each working fewer hours—to service a single patient. Wang Aff. ¶ 25; Pet. App. 85a ¶ 7; Pet. App. 105a-106a ¶ 8. Many agencies report that they would no longer be able to limit the number of aides assigned to a case or accommodate client requests for the same aides; that is, aides whom the clients have come to know and who are, by experience, knowledgeable about the clients' care needs. Wang Aff. ¶ 25; Pet. App. 85a-86a ¶ 8; Pet. App. 100a ¶ 22.

An increase in the number of caregivers could have a significant deleterious effect on home care clients, who benefit from both the personal comfort and increased quality of service afforded by having only one or two regular care providers. Pet. App. 85a-86a ¶ 8; Pet. App. 99a ¶ 19. Those patients suffering from cognitive impairments, such as Alz-

heimer's Disease and other forms of dementia, generally receive full time care and experience particular benefit from close interaction with familiar caregivers. *See* Pet. App. 85a-86a ¶ 8. These individuals represent a significant portion of those in need of home care services. For example, in New York City, more than half of Medicaid home care recipients have some degree of cognitive impairment, and thirty percent have moderate to severe cognitive impairment.[14] Changing from a single familiar attendant on duty for twelve hours to multiple short shifts of attendants is a disruption of routine that can be disturbing for such patients. *See* Pet. App. 85a-86a ¶ 8. Congress intended for these patients to be able to obtain affordable care in their homes, if at all possible.

The option left to home care patients and their families upon elimination of the third-party employer exemption would be to act as the direct employer of home care workers. For many, perhaps most, this is no option at all. Many individuals are not physically or mentally able to engage in all the activities required to employ individuals directly to provide companionship services, including finding caregivers, confirming their qualifications, screening out those with criminal backgrounds, negotiating wages, arranging for payment of wages, handling the required tax and other regulatory paperwork, and making sure that shifts are covered when a companion is sick or otherwise unavailable. These burdens, together with the complexities of adhering to the requirements of government reimbursement programs in order to obtain funding for the services, eliminate direct employment as a viable or desirable possibility for most patients and their families.

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[14] Alene Hokenstad *et al.*, *Medicaid Home Care Services in New York City: Service Utilization & Family Involvement* 12 (United Hosp. Fund of N.Y. May 1998).

In sum, the impact on home care patients that would result from elimination of the third-party employer exemption would be negative and severe—and directly contrary to the plainly expressed intent of Congress. The Department of Labor accounted for these effects when it originally promulgated the regulation, and again when it decided to retain the regulation as recently as 2002 after consideration of its possible withdrawal. *See* 67 Fed. Reg. 16,668. The judiciary should defer to that well-considered policy choice.

D. Because Of Constraints On Government Reimbursements And Provider Resources The Second Circuit's Ruling Threatens To Adversely Impact Home Care Workers Themselves

Amici fully recognize the importance of making home care companionship employment sufficiently attractive and remunerative to attract dedicated workers to meet the growing demand for these services. However, due to significant constraints within the system, the Second Circuit's ruling is likely to undermine this goal. Again, because the Second Circuit had no record before it,[15] and did not make reference to either of the two separate rulemaking records compiled by the agency, that court did not find, and could not have found, that its ruling would actually increase overall compensation to home health care workers.

As noted in the Petition for Certiorari at 15, and further elaborated on above, home care providers will be unable to bear the cost of overtime compensation. Many providers will thus have no choice but to significantly curtail their employees' work hours in order to avoid incurring ruinous time-and-a-half overtime obligations. *See* Pet. App. 105a-106a ¶ 8.

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[15] *See* Pet. App. 34a (record at pleadings stage provided "little factual background").

This would not only cause severe disruptions for clients needing care, as outlined in the previous section, but threatens harm to health care workers themselves, who will end up with less income, not more. The Second Circuit's ruling is thus likely to have consequences that court may not have intended or foreseen, demonstrating again the hazards that result when a court improperly treads on ground better left to the agency under established deference principles.

Addressing this issue in its opposition to the Petition, Respondent emphasized that provision of home health care services is "heavily subsidized by federal and state government." Respondent's Brief in Opposition, dated December 15, 2006, at 4, 6-7. This is no answer, however. As noted above, providers' reliance on government reimbursement through Medicaid and Medicare is not the solution, since governmental payments typically do not fully cover current operating costs. There is no reason to think that the governmental agencies that administer these programs locally will suddenly find the funds to pay for overtime compensation rather than demand that the providers hire more workers at straight-time rates.

Medicare and Medicaid budgets are subject to very significant constraints that will not ameliorate in the short or medium term and are extremely unlikely to ameliorate in the long term. The Deficit Reduction Act of 2005, Pub L. No. 109-171, states a goal of reducing federal Medicaid spending by $6.9 billion over a five-year period and $28.3 billion over a ten-year period.[16] Federal law provided a zero percent in-

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[16] *See* Congressional Budget Office, Cost Estimate, *S. 1932: Deficit Reduction Act of 2005* (Jan. 26, 2006), at 35 (describing "Subtitle A—Medicaid" of the Act as follows: "Enacting subtitle A would reduce direct spending by $6.9 billion over the 2006-2010 period and by $28.3 billion over the 2006-2015 period"), *available at* http://www.cbo.gov/ftpdocs/70xx/doc7028/s1932conf.pdf.

flation increase in Medicare payments for fiscal year 2006,[17] and the Administration's proposed 2007 budget would freeze Medicare payments for another year.[18]

Removing the minimum wage and overtime exemption of Section 552.109(a) will raise compensation for home care workers only if there is, in fact, additional money to pay increased overtime expenses. Since third-party payers, most notably Medicare and Medicaid, have significant control over vendors' ability to set worker compensation,[19] providers would be largely dependent on government reimbursements to fund any increased overtime payments. Rates are also subject to overall state budget processes, and providers are subject to considerable uncertainty regarding their year-to-year funding.

The unavailability and uncertainty of funding makes it quite likely that providers would have to curtail work hours to avoid costly overtime payments. Workers would thus not have the opportunity either to earn overtime pay or to work longer hours for additional straight-time compensation. *See* Pet. App. 105a-106a ¶¶ 6-8. Alternatively, workers would

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[17] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5201, 120 Stat. 4, 46-47 (Feb. 8, 2006), amending 42 U.S.C. § 1395fff(b)(3)(B)(ii)(IV).

[18] *See* Department of Health & Human Services, *FY 2007 Budget in Brief: Centers for Medicare & Medicaid Services*, at 9 ("Specifically, based on the most recent recommendations from the Medicare Payment Advisory Commission (MedPAC) for 2007, the Budget proposes a zero percent payment update for skilled nursing facilities, home health agencies, and inpatient rehabilitation facilities, and an update of the market basket minus 0.45 percent for hospitals"), *available at* http://www.hhs.gov/budget/07budget/centersformed.html.

[19] *See, e.g.*, Robyn Stone, *The Direct Care Worker: A Key Dimension of Home Care Policy*, 16 Home Health Care Mgmt. & Practice 339, 342-43 (Aug. 2004), *available at* http://hhc.sagepub.com; Steven L. Dawson & Rick Surpin, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care* 18-21 (The Aspen Inst. Jan. 2001).

have to work for multiple providers to obtain the extra hours they could not obtain from one provider. The resulting limitation on workers' ability to earn compensation could increase employee attrition and heighten existing staffing shortages. Pet. App. 106a ¶ 9.

In short, unless the Second Circuit decision herein is reversed and the exemption restored, the sudden increase in costs to the home health system will pose grave difficulties to Medicaid-funded home health care and ultimately to other Medicaid-funded services as well. Longer stays in hospitals and increased admissions to nursing homes for Medicaid-eligible patients mean a funneling of patients to more expensive forms of care. Patients will suffer loss of their independence. Moreover, the lot of home health workers will not be appreciably improved. Without money to pay for overtime, employers will have to reduce shifts to avoid overtime. Benefits previously granted to home care workers in collective bargaining agreements may have to be curtailed, as these agreements were premised on the understanding that FLSA requirements do not apply.

CONCLUSION

For all of the foregoing reasons, and those stated in the brief of Petitioners, we respectfully request that this Honorable Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

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No. 06-593

In The

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and
MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF LAW PROFESSORS AND HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The individual *amici* are law professors and historians who teach, write about, or study the history of the Fair Labor Standards Act or the history of domestic service in the United States. *Amici* respectfully file this brief in support of the Respondent's challenge to the Department of Labor's regulation extending the Fair Labor Standards Act's "companionship exemption" to third-party employers. Based on our study as historians and law scholars, we believe that the historical record demonstrates that Congress did not intend the exemption to apply to third-party employers of companions.

Amici include Mark Barenberg, Professor of Law, Columbia University; Eileen Boris, Hull Professor of Women's Studies, University of California, Santa Barbara; Nancy Dowd, Chesterfield Smith Professor of Law, Levin College of Law, University of Florida; Cynthia Estlund, Catherine A. Rein Professor of Law, New York University School of Law; Evelyn Nakano Glenn, Professor, Asian American Studies, University of California, Berkeley; Jennifer Gordon, Associate Professor of Law, Fordham Law School; David Katzman, Professor of American Studies & History, University of Kansas; Laura Kessler, Associate Professor of Law, University of Utah, S. J. Quinney College of Law; Jennifer Klein, Assistant Professor of History, Yale University; Phyllis Palmer, Professor of American Studies & Women's Studies, George Washington University; Judith Rollins, Professor of Africana Studies &

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[1] All parties have consented to the filing of this brief. Copies of their written consents have been filed with the Clerk of the Court. *Amici curiae* certify that no counsel for a party has authored any part of this brief.

Sociology, Wellesley College; Katharine Silbaugh, Professor of Law, Boston University School of Law; Peggie Smith, Professor of Law, University of Iowa College of Law; Michael Wishnie, Clinical Professor of Law, Yale University; and Noah Zatz, Acting Professor of Law, University of California, Los Angeles, School of Law.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to 1974, the Fair Labor Standards Act (FLSA) did not reach workers in domestic service employment – those employed by private households – because of doubt about whether they were engaged in interstate commerce. Congress specifically extended coverage to these workers in 1974, when it amended the FLSA to apply to employees "employed in domestic service in a household." 29 U.S.C. § 206(f) (including domestic service workers in the minimum-wage provisions); 29 U.S.C. § 207(l) (including domestic service workers in the overtime provisions).

In passing the domestic service amendment, Congress simultaneously limited its reach by crafting an exemption from the FLSA's minimum-wage and overtime provisions for persons "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves. . . ." 29 U.S.C. § 213(a)(15). As a result of the exemption, the FLSA does not apply to employees in domestic service employment who provide companionship

[2] Institutional affiliations are provided for purposes of identification only.

services. The Department of Labor (DOL) has interpreted the companionship services exemption to apply to third-party employers such that domestic service employees "who are engaged in providing companionship services . . . and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements. . . ." 29 C.F.R. § 552.109(a). The regulation allows third-party employers, including home care agencies that place domestic service employees in individual private homes, to avoid paying the workers minimum wages and overtime under the FLSA. The United States Court of Appeals for the Second Circuit held that 29 C.F.R. § 552.109(a) was inconsistent with congressional intent in amending the FLSA in 1974 to extend the coverage to domestic service employees.

Both the legislative history of the companionship services exemption and the general history of domestic service support the Second Circuit's determination that extending the "companionship exemption" to third-party employers is inconsistent with Congressional intent in amending the FLSA to cover domestic service employees. History reveals that Congress understood "domestic service employment," as that phrase is used in the companionship exemption, to refer to an individual and personal employment relationship, not a third-party relationship that involves an agency.

ARGUMENT

I. DOL'S THIRD-PARTY REGULATION IS INCONSISTENT WITH CONGRESSIONAL INTENT

A. Congress Did Not Intend the Phrase "Domestic Service Employment" to Include Third-Party Domestic Service Employment

The legislative history of the 1974 Amendments supports the conclusion that "domestic service employment" was not intended to apply to third-party employers of the type at issue in the case before the Court. First, at the time of the 1974 Amendments, the FLSA already protected domestic service employees employed by third-party employers where the third party was an entity that qualified as part of an enterprise. *See* 39 Fed. Reg. 35385 (1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . [were] subject to the [FLSA] prior to the 1974 Amendments"); Department of Labor, Private Household Workers (1974), at 7, n.1 ("Employees of a household service business are *presently* covered by the FLSA if the business is a part of an enterprise under section 3(s) of the Act.") (emphasis added).[3] Consequently, Petitioners' argument that "domestic service employment" includes third-party employers would mean that

[3] Members of Congress were fully aware of this preexisting coverage because the DOL reported it to them in reports that were cited in the Committee Reports and on the floor. *See* S. Rep. No. 93-300, at 21 (referencing the 1973 DOL Report, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act); S. Rep. No. 93-690, at 19 (referencing the 1974 DOL Report, Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act); 119 Cong. Rec. 24,796 (1973) (statement of Sen. Dominick) (same).

previously covered domestic service employees performing companionship services would be excluded in the aftermath of the 1974 Amendments. Such a result runs completely counter to Congress' purpose in amending the FLSA to expand the act's coverage. 39 Fed. Reg. 35385 (1974) ("[I]t was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees."). In addition, it seems unlikely that Congress, while aiming to protect more domestic service employees, would have simultaneously excluded previously included domestic service employees without any reference to doing so in the Amendments' legislative history.

Because the FLSA already covered most third-party domestic service employees, it stands to reason that when Congress sought to expand coverage of the act, it had in mind the many workers employed on an individual and personal basis, by household members and/or family members. Various House and Senate Reports support this conclusion. The Reports describe domestic service by observing that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person *by whom he or she is employed.*" *See* S. Rep. No. 93-690, 93rd Cong., 2d Sess. 20 (1974) (emphasis added); S. Rep. No. 93-300, 93rd Cong., 1st Sess. 22 (1973); H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 35 (1974). Petitioners seek to undermine this description as one that was "generally accepted" by observing that domestic service was often equated with "private household workers." Pet. Br. at 35-36 (referencing Department of Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1973), at 27; Department of

Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1974), at 31-32). Because DOL Reports describe the latter phrase to include employers other than homeowners,[4] Petitioners reason that when members of Congress used "private household workers" they were necessarily indifferent to "the nature of the employer." Pet. Br. at 36. The legislative history does not support this argument nor does the history of domestic service.

The mere fact that DOL used the phrase "private household workers" to refer to "domestic service employees" (and defined "private household workers" so as to include third-party employers)[5] does not support Petitioners' view that the phrase included third-party employment. The former phrase appears to have come into vogue with the National Committee on Household Employment (NCHE), an organization started in 1928 to improve conditions in domestic service and to elevate the job into a profession. *See* BENJAMIN ANDREWS, ECONOMICS OF THE HOUSEHOLD 501-04 (1935); Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race and Agendas of Reform*, 48 AMERICAN UNIV. L. REV. 851, 883-85 (1999).[6]

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[4] *See* Department of Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1973), at 27; Department of Labor, Report to Congress on Minimum Wage and Maximum Hours Under the Fair Labor Standards Act (1974), at 31-32.

[5] *Id.*

[6] While the shift from the phrase "domestic service" to phrases such as "household worker" and "household employee" gained popularity as a result of the NCHE, these and similar phrases were used much earlier and interchangeably with "domestic service" and "servant." *See, e.g., Household Employment and the Business Basis*, 2 BULL. INTER-MUNICIPAL COMM. ON HOUSEHOLD RES. 8, at 8-9 (Nov. 1905) (referencing

(Continued on following page)

An initial priority for NCHE was to replace the use of terms such as "servant," "maid," and "domestic" with the phrase "household employee." ANDREWS, at 502. Throughout the 1930s and 1940s, commentators used a variety of phrases interchangeably to refer to domestic service including "household employees," "household workers" and "houseworker." *See, e.g.*, Clara Cook, *Help Wanted!* at 1, 16 (Women's Trade Union League, 1939) (using "domestic worker" and "household employee" interchangeably); Benson Ellis, *Unemployment Insurance for the Household Worker*, 34 J. OF HOME ECON. 161, 161 (1942) (referring to domestic service employees as "household workers"); Mary Everett, *Can Domestic Service Be Standardized? Industrial Regulation Versus Human Values in Household Employment*, 30 J. AM. ASS'N U. WOMEN 90, 90-92 (1937) (using "domestic," "maids," "houseworkers," and "girl" interchangeably).[7]

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comments by individuals who used various phrases to describe domestic service workers including "houseworker" and "household employee").

[7] Commentators often referred to "employment agencies" when speaking of domestic service in private homes but by all accounts such agencies were not employers of the domestics. Instead, the agencies were placement agencies that matched workers with household employers. *See* Marie Correll, *Standards of Placement Agencies for Household Employees*, BULLETIN OF THE WOMEN'S BUREAU, No. 112, at 1 (1934) ("Agencies placing domestic workers have an opportunity to influence employment contracts by the giving of information and by refusing to recommend an unreliable worker or a position where the terms and conditions of employment are considered unsatisfactory."); *id.* at 1 (observing that household employment agencies "secur[e] positions for applicants"); BRENDA CLEGG GRAY, BLACK FEMALE DOMESTICS DURING THE DEPRESSION IN NEW YORK CITY, 1930-40, at 5 (1993) (discussing "[e]mployment agencies" during the Depression "whose primary purpose was to help domestics find work during the thirties").

Moreover, commentators used these phrases in discussions that not only had no relevance to third-party employment but which underscored domestic service employment as a "household employment . . . relation between individual employer and employee. . . ." Eleanor B. Johnson, *Household Employment in Chicago,* BULLETIN OF THE WOMEN'S BUREAU, No. 106, at 2 (1933). *See also* Jean Collier Brown, *Reading List of References on Household Employment,* BULLETIN OF THE WOMEN'S BUREAU, No. 154, at vii (1937) ("Household employment is a relation between individual employers and individual employees."); Correll, *Standards of Placement Agencies for Household Employees,* at 1 (describing household employment as "a personal relationship between employer and employee, an individual bargain for employment"); Amey Watson, *Household Employment in Philadelphia,* BULLETIN OF THE WOMEN'S BUREAU, No. 93, at 46 (1932) (discussing section on "Employers' Labor Policies" in regard to "householders who employ domestic workers").[8]

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[8] Historians of domestic service also consistently underscore the personal and individual character of the employment relationship. *See, e.g.*, ELIZABETH CLARK-LEWIS, LIVING IN, LIVING OUT, at 100-13 (1994) (describing the personal quality of the domestic service relationship in connection with African-American household workers who migrated from the South to work in Washington, D.C. during the 1910s and 1920s); EVELYN NAKANO GLENN, ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE, at 153-64 (1986) (describing "Employer-Employee Relations" in domestic service, in the context of Japanese American domestics, as a personal relationship characterized by inequality); DAVID M. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA, at 146-83 (1978) (describing the employing class in terms of the mistress/servant relationship in the period from 1870 to 1920); PHYLLIS M. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945, at 71-87 (1989) (describing the hiring and supervision of domestic service employees by

(Continued on following page)

In short, the fact that House and Senate Committee Reports borrowed from various DOL Reports and occasionally used the phrase "private household workers" to refer to domestic service employees should not be taken as evidence that members of Congress were "not thinking about the nature of the employer," Pet. Br. at 36, or that they were using the phrase so as to include third-party employment. Indeed, to the contrary, House and Senate Reports on the 1974 Amendments indicate that Congress was centrally concerned about domestic service employers who were individual households and/or family members, and more specifically housewives. S. Rep. No. 93-690, at 20 ("This Committee is convinced that legislation ... with respect to fair labor standards for domestics will be followed by voluntary compliance on the part of most housewives."); H.R. Rep. No. 93-913, at 33 ("[Domestic service employees] have no appeal against the employer who calls suddenly in the morning, or announces upon arrival, 'We won't need you, after all.'"); H.R. Rep. No. 93-232, 1st Sess., at 95 (1973) (minority views) ("Each of these newly affected [household] employers ... would have to keep records of hours worked on a regular basis, overtime, and salaries paid. Do we really want to subject housewives to possible criminal penalties for failure to keep these records accurately?"); 119 Cong. Rec. 24,797 (1973) (statement of Sen. Dominick) ("Do we want to try to pass a law which is

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housewives during the 1930s and 1940s); JUDITH ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS, at 156 (1985) (describing domestic service as "a personal relationship between employer and employee"); BONNIE THORNTON-DILL, ACROSS THE BOUNDARIES OF RACE AND CLASS: AN EXPLORATION OF WORK AND FAMILY AMONG BLACK FEMALE DOMESTIC SERVANTS, at 8-9 (1994) (describing the domestic service relationship as an individual employment relationship).

not going to be abided by by the householder, either in terms of amount or in terms of reporting?"); *id.* ("It is unrealistic to expect accurate recordkeeping. Nobody is going to keep any records. . . . No housewife is going to begin to do this kind of recordkeeping."); *id.* (statement of Sen. Javits) (referencing the number of housewives complying with the Social Security Act with respect to domestic service employees); *id.* at 24,798 (statement of Sen. Dominick) ("Why in the world should the Government keep putting on the *private individual* the onus of keeping records after records and making reports after reports . . . ?") (emphasis added); *id.* at 24,799 (Statement of Mr. Williams) (noting the lack of respect accorded to domestic service employees and stating "[t]hey are called 'girl' and by their first names while they, themselves, must still address their employers and their employer's children as 'ma'am' or 'sir' or 'Miss Jane' "); *id.* ("In lieu of fair wages, [domestic service employees] are often given secondhand clothing and leftover food."); S. Rep. No. 93-300, 93rd Cong., 1st Sess. 121 (1973) (minority views) ("Because some domestic workers are poorly paid, is no reason to bring the Federal bureaucracy into the kitchen of the American housewife.").

Petitioners argue that excluding third-party employers from section 213(a)(15) would undermine Congressional intent " 'to include within the coverage of the Act all employees whose vocation is domestic service.' " Pet. Br. at 14 (*quoting* S. Rep. No. 93-690, at 20). Yet Petitioner fails to appreciate that "domestic service employment" is limited to the companionship services exemption. While Petitioners are arguably correct that Congress did not intend to create a distinction between domestic service employment by households to provide companionship

services and companionship employment by "a family member to help out another family member in the latter's home," *id.* at 37, Petitioners are incorrect that interpreting "domestic service employment" to exclude third-party employers will lead to this result. This Court should not hold that domestic service, as used in section 213(a)(15), applies "only to homeowner-employed domestic workers. . . ." *Id.* Instead, it should hold that such employment *does not* apply to third-party employers; namely agency employers that employ domestic service employees and staff them in private homes.

This approach most clearly reflects the reality and understanding of domestic service employment that shaped Congressional intent. As previously noted, the FLSA already provided a basis for coverage of third-party employers if they satisfied the enterprise test. In addition, even as one recognizes that the majority of all domestic service employment was between an employee and the employing household, there is no reason to think that by "domestic service employment" Congress did not intend to include other personal domestic service employment relationships such as those where an employing family member does not reside in the household where the services are being performed.[9]

[9] In the instance of the severely disabled householder who needs companionship services, cited by Petitioners and their *amici*, Pet. Br. at 38; Br. of National Association For Home Care & Hospice, Inc. at 6, the requirement of domestic service employment in the companionship exemption can be satisfied by simply having a family member employ the companion as the legal guardian of the householder.

B. Congress Intended to Exclude Only Non-"Bread-Winners" Who Work as Domestic Service Companions

In crafting the companionship services exemption, Congress appears to have taken comfort in the belief that it would have few, if any, adverse economic consequences for individuals performing such services. House and Senate Reports observed that "[p]eople who will be employed in the excluded categories are not regular bread-winners or responsible for their families' support." S. Rep. No. 93-690, at 20; H.R. Conf. Rep. No. 93-413, at 27; H.R. Rep. No. 93-913, at 36. In today's world, the group of home care workers employed by third-party agencies who are frequently classified under the FLSA as companions jarringly defies this observation. The average home-care worker is a low-income woman and a single mother of children under the age of eighteen. *See, e.g.*, STEVE DAWSON & RICK SURPIN, DIRECT CARE HEALTH WORKERS: THE UNNECESSARY CRISIS 12 (2001), *available at* http://www.directcareclearinghouse.org/download/Aspen.pdf (commenting that the "typical direct-care worker is a low-income woman, between the ages of 25 and 54, who is a single mother"); ROBYN STONE, LONG-TERM CARE WORKFORCE SHORTAGES: IMPACT ON FAMILIES 2 (2001), *available at* http://www.bjbc.org/content/docs/LTC_Workforce_Shortages.pdf ("Compared to the workforce in general, nursing home and home health care aides are more likely to be non-white, unmarried and with children under age 18 at home."); *Nursing Workforce Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Hearing Before the S. Comm. on Health, Education, Labor & Pensions* 107th Cong. 22 (2001) (statement of William J. Scanlon, Director, Health Care Issues), *available at* http://www.gao.gov/new.items/d01750t.pdf ("Aides working in nursing homes and

home care are much more likely than other workers to be uninsured, living below the poverty level, and receiving public benefits such as food stamps and Medicaid."). In 2003, the wages of home-care aides, when annualized for full-time employment, were less than $17,000. BERNADETTE WRIGHT, DIRECT CARE WORKERS IN LONG-TERM CARE 2 (2005), *available at* http://www.hcbs.org/files/75/3748/directcare.pdf (reporting annualized full-time employment earnings of $16,750 for personal and home-care aides, and $18,200 for home-health aides). Interpreting the companionship exemption to exclude third-party employers of these workers who are often familial breadwinners accurately reflects Congressional intent.

II. OTHER FEDERAL EMPLOYMENT STATUTES SUPPORT THE EXCLUSION OF DOMESTIC SERVICE COMPANIONS EMPLOYED BY THIRD PARTIES

Interpreting "domestic service employment" in the FLSA's companionship exemption to exclude third-party employers also finds support in other federal employment law statutes. Those statutes, including the Social Security Act, the National Labor Relations Act, and the Occupational Safety and Health Act, have uniformly limited the exclusion of domestics, whether express or implied, to those workers employed on a personal basis. Before the Social Security Act was amended in 1950 to extend coverage to domestics, it excluded "Domestic Service in a private home." Social Security Act of 1935, § 210(b)(2). The regulation defining domestic service under the original Act made clear that the exclusion did not extend to employees of third-party employers. The regulation defined "Domestic Service" as "Services of a household nature performed

by an employee in or about the private home of the person by whom he is employed." 20 C.F.R. § 403.809 (1949). Likewise, the current version of the Social Security Act permits special treatment only to wages paid to "an employee for domestic service in a private home of the employer. . . ." 42 U.S.C. § 409(a)(6)(B) (2000).

Section 2(3) of the National Labor Relations Act (NLRA) excludes from the definition of "employee" anyone employed "in the domestic service of any family or person at his home." 29 U.S.C. § 152(3). The National Labor Relations Board has defined the domestic service exclusion so as to limit it to "'employment on an individual and personal basis.'" *30 Sutton Place Corp. & Local 32B-32J, Service Employees Int'l Union*, 240 NLRB 752, 753 n.6 (1979) (*quoting Success Village Apartments, Inc. v. Local 376, UAW*, 397 A.2d 85, 87 (Conn. 1978)). *See also Ankh Serv., Inc.*, 243 NLRB 478, 480 (1979) (observing that the exemption has been applied based "on the principals to whom the employer-employee relationship . . . runs and not merely on the undisputably 'domestic' nature of some of the services rendered"); *Personal Touch Home Care, Inc.*, Case No. 29-RC-9697 (2001), *available at* http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2001/2-RC-22447.pdf (rejecting the claim that the NLRA exempts third-party home care employees as "domestic service" employees under the Act).

The Occupational Safety and Health Act does not exempt domestic service from coverage. However, DOL regulations interpreting the Act do explicitly exempt domestic service employment as a matter of policy. 29 C.F.R. § 1975.6. The relevant regulation states that "individuals who, in their own residences, privately employ persons for the purpose of performing . . . what are

commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children, shall not be subject to the requirements of the Act with respect to such employment." *Id.* Because DOL defines employers of "domestic service" as those "individuals who, in their own residences, privately employ persons," the exemption does not extend to third-party domestic service employers. *Id. See also* Peggie Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the 21st Century*, 92 IOWA L. REV. – (forthcoming 2007) (discussing OSHA's relevance to domestic service employees).

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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No. 06-593

IN THE
Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE

Petitioners

- v. -

EVELYN COKE

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

This statement is submitted pursuant to Rule 29.6.

National Association for Home Care & Hospice, Inc. ("NAHC") is a not-for-profit organization incorporated under the laws of the District of Columbia. NAHC states that it has no parent corporation and no publicly held corporation owns any of its stock.

INTEREST OF THE AMICUS CURIAE

The National Association for Home Care & Hospice, Inc. (NAHC) is a not for profit trade association representing the interests of nearly 6,000 home and community based health care providers throughout the nation. NAHC submits this amicus[1] curiae brief in support of the Petitioners regarding the decision of the United States Court of Appeals for the Second Circuit in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006).[2]

NAHC has directly participated in legislative and regulatory matters involved in the companionship services exemption under the Wage & Hour law of the Fair Labor Standards Act that is at issue in this matter. NAHC members across the United States and the millions of individuals who receive their services face a risk of severe adverse impact through the Court of Appeals decision.

The Second Circuit's decision poses a risk to the continued viability of home care services, raising costs for home care providers, increasing reimbursement obligations for government and private third-party payers, forcing undesired limits on the working hours of caregivers, and impeding access to the care settings of choice for millions of elderly and disabled citizens.

NAHC urges this Court to reverse the decision below.

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[1] *Amicus* certifies that this brief was authored in whole by Counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No other person of entity made any monetary contribution to the preparation or submission of this brief.

[2] All parties have consented in writing to the filing of this brief. Copies of the written consents have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Home care is a vital resource that allows infirm and disabled individuals of all ages to remain in their own homes, outside of a costly institutional care setting. Companionship services is one crucial component of home care. Persons receiving companionship services come in all age categories and degrees of disability.

The home care delivery system essentially controls the determination as to whether "companionship services" are accessible to consumers directly or through entities. That system, rather than the marketplace, determines whether the care recipient in the home acts or can act as the employer of the individual providing the companionship services. Licensing and funding sources, particularly government-based programs, significantly impact on the service delivery mode with most establishing an employer role in the entity authorized to supply the services rather than permitting the direct consumer to take on that role.

The ruling of the Second Circuit should be understood as creating a standard that will discriminate against the elderly and infirm who either must rely upon government-based care financing or who live in states where quality of care is enhanced through licensing standards. It also will discriminate against those that cannot mentally or physically undertake the responsibilities of being an employer. The ruling will increase costs for Medicare, Medicaid, and other government programs while encouraging consumers to acquire care outside the established standards of quality to save on overtime compensation.

The Court of Appeals failed to apply basic tenets of administrative law, including its erroneous reading of the statutory language itself in finding 29 CFR §552.109(a) unenforceable. In focusing on the regulatory definitions

of "domestic services" at 29 C.F.R. §552.3, the Court of Appeals neglected to evaluate the meaning of the term "any employee" under 29 U.S.C. §213(a)(15). The analysis of 552.109(a) should have ended with the unambiguous language of the statute.

The Secretary's original rulemaking effort recognizes this distinction.

Congress well understood how to draft statutory language that narrowed the concept of domestic service in the manner necessary to exclude application to third-party employment of domestic service employees if it so desired. Congress enacted provisions in the Social Security Act and the Internal Revenue Code that limited to domestic services "*in the home of the employer*." It is apparent that Congress understood the concept of "domestic services" to relate solely to the nature of the employee's activities.

In addition, the time-honored and well-developed processes for promulgating administrative rules also are essentially disregarded by the Court of Appeals in this matter. As a participant in these and many other rulemaking efforts, Amicus is greatly concerned about the potential impact that the Court's action may have. This Court and lower courts throughout the land have routinely emphasized the critical importance of the rulemaking process to the accuracy and reliability of governance. Great deference should be given to the Secretary in promulgating 552.109 through extensive rulemaking efforts.

The rulemaking process allows the administrative agency to display its expertise while allowing all interested parties to participate in that deliberative process. To ignore that process with 552.109 is an affront to all rulemaking. Section 552.109 is a reasonable and rational approach to achieve the goals of the companionship services exemption. By focusing on the

infirm and elderly in enacting a companionship services exemption, Congress targets our nation's most vulnerable population.

The point of the companionship services exemption is to assist the infirm and elderly in getting care because Congress recognized their special needs. This provision is designed to protect the consumer from high costs, not to protect the employer from higher wage obligations.

The Secretary's construction of section 213(a)(15) also avoids the very troubling discriminatory result if this exemption applies only to directly-employed caregivers. Such discrimination would be at odds with repeated efforts by Congress and the Executive Branch to end disability-based barriers. Accordingly, even applying only the slightest level of deference to the Secretary, 552.109(a) is a permissible construction of the FLSA.

ARGUMENT

A. COMPANIONSHIP SERVICES IS AN ESSENTIAL SERVICE IN CARING FOR THE ELDERLY AND INFIRM IN THEIR OWN HOMES.

The matter before the Court concerns the correct interpretation and application of the "companionship services" exemption under the Fair Labor Standards Act of 1974. However, to fully understand the issue, "companionship services" must be placed in the context of the elaborate and complex system in which those services are provided. Home care is that system.

Home care in the United States has one common thread – it is a vital resource that allows infirm and disabled individuals of all ages to remain in their own homes, outside of a costly institutional care setting.

Companionship services is one crucial component of home care in that it is the means by which the individual meets their ongoing personal care needs. 29 C.F.R. §552.6 (personal care is within the definition of "companionship services").

Persons receiving companionship services come in all age categories and degrees of disability. "Basic Statistics About Home Care," National Association for Home Care & Hospice, Inc. (2004, http://www.nahc.org/04HC_Stats.pdf. The primary recipient of the service is elderly with chronic infirmities that compromise the person's ability to perform his own activities of daily living such as personal hygiene, ambulation, feeding, and transfers. The disabilities are caused by a variety of illnesses including Parkinson's Disease, Chronic Obstructive Pulmonary Disease, Multiple Sclerosis, Diabetes, Cardiac Insufficiency, and Hypertension.

Necessary personal care services are provided by family members, friends, and unrelated caregivers. Services may be provided without cost or for compensation. When involving paid caregivers, the nature of the provider is often tied to the nature of the funding. Medicare and Medicaid supply significant financing for personal care services with a broad variety of programs.

Under Medicare, personal care services are covered under the "home health services" benefit under the label of "home health aide" services. 42 U.S.C. §§ 1395f(a)(2)(c); 1395x(m)(4); 42 CFR § 409.45(b). In 2005, approximately 2.8 million Medicare beneficiaries received home health services, including an estimated 10 million home health aide visits. These services must be provided by home health agencies that meet stringent "conditions of participation," 42 U.S.C. §1395x(o); 42 CFR Part 484. Among the relevant conditions, home health aide services

must be provided under the supervision of a nurse by persons who meet certain training and competency standards. 42 USC § 1395bbb(a)(3)(A); 42 CFR § 484.36.

Medicaid home- and community-based care programs vary widely by state. All states offer a "home health services" benefit that includes skilled nursing and home health aide services. 42 USC § 1396a(a)(10)(D). These services must be provided by an entity that meets Medicare conditions of participation as a "home health agency." 42 CFR § 440.70(d). In addition, states have the option to provide further home care services under the Personal Care Service and Home and Community Based Services benefits. 42 CFR §§ 440.167; 440.180. Finally, states can devise programs under broad waiver authority that provide home care as an alternative to more costly institutional care. 42 USC §§ 1396n(c); 1396n(d); *see, Olmstead v. L.C.*, 527 US 581 (1999). All the states have one or more of these so-called "waiver" programs that provide personal care support to the disabled and elderly in their own homes.

With Medicaid home care programs, other than the "home health services" benefit, the state determines the nature and qualifications of the providers of care. In most cases the provider is an entity that meets state-outlined organizational and quality standards. These entities also act as the employer of personal care attendants/home care aides. Alternatively, states offer Medicaid coverage of personal care services through the use of individual providers wherein the Medicaid beneficiary selects and services the caregiver. A broad variety of delivery systems have developed to operate with an "individual provider" benefit mode. These include arrangements where state or local government manage the workforce for the Medicaid beneficiary population, taking on elements of the employer role, but not acting as an employer in the comprehensive sense.

See, e.g., California In-Home Supportive Services, http://dss.cahwnet.gov/cdssweb/In-HomeSup_173.htm. Still other delivery methods have the state contracting with a fiscal agent that manages such functions as recruitment, training, and payroll with the Medicaid beneficiary responsible for selecting the caregiver and managing the caregiver's actions in the home. See, e.g., 8.315.4 NMAC (New Mexico Administrative Code). Finally, some states offer "cash and counseling" programs that provide the Medicaid beneficiary with financial support towards the purchase of personal care services in whatever mode is chosen by the beneficiary.

Beyond government-based financing, home care services can be purchased by the consumer with their own private funds. These services are available through home care agencies, care registries, and individual providers. The availability and makeup of these providers depends, in part, on the licensing requirements in the specific state. These standards are nearly endless in their variety and variations. Some states have no licensing requirements. Others require licensing of agencies, registries, and individuals providing care in the home. Still others only license home care agencies, but not other forms of personal care delivery.

The nature of the care provider in a given government program generally reflects a decision of that program relating to the depth of quality of care controls. Similarly, state decisions on licensing indicate a choice of quality of care standards. Whether based on financing or licensing standards, there are stronger quality of care standards in an agency mode of delivery than an individual provider mode.

The home care delivery system essentially controls the determination as to whether "companionship services" are accessible to consumers directly or through entities. That system, rather than the marketplace,

determines whether the care recipient in the home acts or can act as the employer of the individual providing the companionship services. Licensing and funding sources, particularly government-based programs, significantly impact on the service delivery mode with most establishing an employer role in the entity authorized to supply the services rather than permitting the direct consumer to take on that role.

In this context, the ruling of the Second Circuit must be understood as creating a standard for minimum wage and overtime compensation under the Fair Labor Standards Act that will discriminate against the elderly and infirm who either must rely upon government-based care financing or who live in states where quality of care is enhanced through licensing standards. It is a ruling that gives purchase cost advantages to those with sufficient personal financial resources to secure care through hiring their own employees. The ruling will impede access to home care by increasing costs for Medicare, Medicaid, and other government programs while encouraging consumers to acquire care outside the established standards of quality to save on overtime compensation. Congress, in trying to help the infirm and elderly with personal care needs, did not intend this result when it enacted the companionship services exemption.

B. THE COMPANIONSHIP SERVICES EXEMPTION UNDER THE LANGUAGE OF THE FLSA AUTHORIZES ITS APPLICATION TO ALL EMPLOYERS.

At the center of this case is whether the Fair Labor Standards Act of 1974 permits the application of the companionship services exemption under 29 U.S.C. §213(a)(15) to individuals employed by third-party

employers. The Court of Appeals for the Second Circuit held that it did not, finding the regulation expressing such, 29 C.F.R. §552.109, to be unenforceable. In doing so, the Court of Appeals failed to apply basic tenets of administrative law, including its erroneous reading of the statutory language itself.

The entirety of the companionship services exemption is found at 29 U.S.C. §213(a)(15), which applies the exemption to:

> " . . any employee employed on a casual basis in domestic services employment to provide babysitting services or any employee employed in domestic services employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

To determine the meaning of an enactment of Congress, the judiciary must first consider the language of the statutory provision itself. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 842 (1984). If the language is unambiguous, that is the end of the inquiry. Chevron, 467 US at 842-843. The Court of Appeals apparently found the language to be ambiguous because such terms as "domestic services" and "companionship services" were not defined. Pet. Ap. 2a (Coke II, "we adhere to our original position"); Pet. Ap. 17a, 23a-24a (Coke II, Court moves to Chevron Step 2 analysis without addressing statutory language). In doing so, the Court of Appeals proceeded to the second step in the Chevron standard for statutory interpretation prematurely.

The Court of Appeals found ambiguity in the statutory language not in the language itself, but rather in the regulations promulgated by the Secretary pursuant to 29 U.S.C. §213(a)(15). In particular, the Court of Appeals focused on the claimed inconsistency between the definition of domestic services in 29 C.F.R. §552.3 and the applicability of the companionship services exemption to third-party employment in 29 C.F.R. §552.109. Pet. Ap. 5a However, in the Chevron Step 1 analysis, ambiguity in the statutory language must have genesis in that language, not implementing regulations. *Chevron*, 467 US at 842.

In focusing on the regulatory definitions of "domestic services" at 29 C.F.R. §552.3, the Court of Appeals neglected to evaluate the meaning of the term "any employee." Without a doubt, the affected "employee" is limited to those in the employment category of domestic service and its subcategory of companionship services. However, the language of section 213(a)(15) does not further condition the application of the exemption solely to those persons employed by the individual receiving the services. Rather than raise questions regarding the validity of applying the exemption to third-party employment, the language of the statute raises question as to the validity of the Secretary's definition of "domestic services" as interpreted by the Court of Appeals.

The Secretary's original rulemaking effort recognizes the distinction between the definitions of "employee" and "domestic services" under 29 U.S.C. §213(a)(15). In revising its proposed rule to account for this distinction relative to 29 C.F.R. §552.109(a), the Secretary states that the exemption "can be available" to such third party employers since it applies to "any employee" engaged "in" the enumerated services. 40 Fed. Reg. 7404, 7405 (1975). The Secretary further states that

this derivation "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions. 40 Fed. Reg. at 7405.

In 1974, the Congress well understood how to draft statutory language that narrowed the concept of domestic service in the manner necessary to exclude application to third-party employment of domestic service employees. In fact, Congress expressed clear awareness of a recently enacted provision in the Social Security Act that contained this language when deliberating the companionship services exemption to the Fair Labor Standards Act. S.Rep. No. 93-690, 93rd Congress, 2d Session at 18. ("This bill would bring under minimum wage and overtime provisions of the Act all employees in private household domestic service earning "wages" ($50 per quarter) for purposes of the Social Security Act, but retains a minimum wage and overtime exemption for...companions...").

Under Public Law 92-5 (March 17, 1971), Congress expanded the application of the Social Security program to domestic services, but specifically excluded taxing wages from a certain subclass of domestic services. Specifically excluded is:

> "(6)(A) Remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;
>
> (B) Cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such

> service is less than the applicable dollar threshold (as defined in section 3121(x) of the Internal Revenue Code of 1986) for such year;
>
> (C) Cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this paragraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in section 210(f)(5); . . . ."

42 U.S.C. §209(a)(6). (Emphasis added.)

Consistent with this statutory language, implementing regulations distinguish the nature of domestic services from the identity of the employer. Under 20 C.F.R. §404.1057(b), domestic services "is work of a household nature" including such services as those performed by cooks, waiters, butlers, maids, and housekeepers. It does not include services performed as a private secretary, tutor, or librarian, even though performed in the employer's home." 42 C.F.R. §404.1057(b).

The Congressional awareness of language necessary to limit application of provisions of law related to domestic services in the home of the employer is further found in the Internal Revenue Code. The tax code is replete with references to "domestic service in a private home of the employer" as distinguished from the more general concept

of "domestic services." *See, e.g.*, 26 U.S.C. §§3510(c); 3121; 3306; 3401; and 3102. Unlike the tax code, the FLSA contains no comparable qualification.

It is apparent that Congress understood the concept of "domestic services" to relate solely to the nature of the employee's activities. Further qualifications such as location ("in a private home") and the identity of the employer ("...of the employer") are necessary to establish intended limitations. The Court of Appeals' attempt to include and limit the identity of the employer in the application of the companionship services exemption overextends the reach of the concept of "domestic services" under 29 U.S.C. §213(a)(15).

It would be wholly illogical and inconsistent for Congress to intend different definitions of the same employment category, "domestic services," under the Fair Labor Standards Act, the Social Security Act, and the Internal Revenue Code. *Barnhart v. Walton*, 535 US 212, 221 (2002) (The same statutory words should not be interpreted differently in closely related contexts); citing, *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 US 332 (1994). It is plain that Congress was aware of the language needed to quality and limit the category of employer for the companionship services exemption in 1974. Congress did not so limit its application to a distinct set of employers under the FLSA. The inquiry should end there.

C. SECTION 552.109(a) IS ENTITLED TO DEFERENCE.

Amicus is mindful that its brief should not be a vehicle for arguments repetitive of those made by Petitioner. Supreme Court Rule 37.1. As such, the principles and tenets of administrative law will not be

recited herein as the Court will assuredly have received such in detail from the parties. It can surely be expected that both parties will exhaust all necessary discussion of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); and *United States v. Mead Corp.*, 533 U.S. 218 (2001), as well as their progeny before this Court and lower courts. Instead, Amicus will focus on two elements that demonstrate that deference to the Department of Labor's interpretation and application of the companionship services exemption under 29 U.S.C. §213(a)(15) is well warranted.

In the preceding section of this brief, Amicus advanced the argument that the language of 29 U.S.C. §213(a)(15) is sufficiently clear to avoid concern over whether, and at what level, deference should be afforded the administration's rule at 29 C.F.R. §552.109 regarding application of the companionship services exemption to third-party employment. That language, and that of other relevant statutes, strongly demonstrates that the Court of Appeals improperly focused on the definition of "domestic services" to the exclusion of the reference to "any employee." However, in the event that this Court does not share that view, Amicus offers the following justification for deference to the rule promulgated by the Secretary.

1. The Repeated Use of Comprehensive Rulemaking Warrants Deference Where the Secretary Is Authorized to Issue Binding Rules.

The time-honored and well-developed processes for promulgating administrative rules is essentially disregarded by the Court of Appeals in this matter. While there is undeniable authority of the Secretary of

Labor to promulgate binding rules in implementing the companionship services exemption under 29 U.S.C. §213(a)(15), ("as such terms are defined and delimited by regulations of the Secretary"), the Court of Appeals fails to offer even a courteous nod to the resulting rulemaking. Pet. Ap. At 27a (the notice-and-comment procedure for 552.109(a) was "at best idiosyncratic and at worst insufficient"). Instead, the court ignores multiple rulemaking efforts because the rule at issue is located under the label of "Interpretations." Pet. Ap. at 3a. (552.109(a) is an interpretive rule because it is located in 552 Subpart B).

As a participant in these and many other rulemaking efforts, Amicus is greatly concerned about the potential impact that the Court's action may have. In this matter alone, millions of infirm and elderly citizens who require and receive personal care in their own homes are affected. In addition, the federal and state programs that fund much of this care also are implicated. Finally, thousands of businesses and their employers are drawn into a litigation fray through one person before one court. Brief of National Association for Home Care & Hospice, Inc. as Amicus Curiae In Support of Petition for a Writ of Certiorari at 4-5.

The result is that the Court of Appeals has substituted its view of the law over that of the federal agency charged with implementing and enforcing that law. More importantly, the court has rejected a process that begins with the expertise of the administrative agency in devising a proposed rule, requires intensive evaluation and analysis by that agency to justify its rule, permits any interested member of the public to review and comment on its proposed rule, and results in a final rule that is made known to all affected parties in an open and accessible manner. The Court of Appeals' cavalier disregard of this process is an offense to Congress and the

public at large. It also serves to severely damage the future credibility of the rulemaking process.

This Court and lower courts throughout the land have routinely emphasized the critical importance of the rulemaking process to the accuracy and reliability of governance. *United States v. Mead Corporation*, 533 US 218, 230 (2001) ("the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudications") (citations omitted). Congress has established and strengthened the rulemaking process over the years to achieve accountability. *See, e.g.*, Administrative Procedures Act, 5 USC 552 *et seq.*; Small Business Regulatory Enforcement Fairness Act of 1996, 5 USC 801 *et seq.*; Regulatory Flexibility Act, 5 U.S.C. §601 *et seq.* These processes were used not once, but multiple times by the Secretary regarding the companionship services exemption, yet the Court of Appeals gave not a shred of deference to the process in holding that 29 C.F.R. §552.109 is unenforceable.

The greatest irony in this case is that the rulemaking process worked. Upon receiving numerous comments from interested federal and state agencies, consumer representatives, workers and their representatives, and employers and their representatives, the Department of Labor multiple times reached the same conclusion: third-party employment is included within the companionship services exemption. 39 Fed. Reg. 35382 (1974); 40 Fed. Reg. 7404 (1975); 58 Fed. Reg. 69310 (1973); 60 Fed. Reg. 46798 (1995); 66 Fed. Reg. 5485 (2001); and 67 Fed. Reg. 16668 (2002). However, instead of recognizing that the rulemaking process did its job, the Court of Appeals criticizes the Secretary because the final rule is not consistent with the proposed rule.

Pet. Ap. 5a3. If the validity of a final rule is to be measure by its consistency with the proposed rule, there is no reason to require public notice and opportunity to comment. The agency should simply publish its final rule without the "fruits" of notice-and-comment rulemaking. *United States v. Mead*, 533 at 230 (2001) ('a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force"). The rulemaking process allows the administrative agency to display its expertise while allowing all interested parties to participate in that deliberative process. To ignore that process with 552.109 is an affront to all rulemaking.

The Court of Appeals discounts the grant of any deference to the rulemaking process in part because it concludes that section 552.109 is not intended to be legally binding. Pet. Ap. 3a-4a. However, the language in the rulemaking, the clear statements of the Department, and the post hoc actions of Congress indicate otherwise.

There should be no dispute that Congress authorized the Secretary to promulgate legally binding rules to implement the companionship services exemption. The direct authorization to "defin[e] and delimi[t] by regulations" the scope of the exemption is significant. *Auer v. Robbins*, 519 US 452, 456 (1997) (finding identical language under Section 213(a)(1) of the

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[3] To the extent that the Secretary's rulemaking expresses inconsistency, the indications are that the Secretary would be inconsistent if she excluded third-party employment from the companionship services exemption. As noted in the debate concerning the 1974 amendments to the FLSA, the Labor Department's concept of a domestic service worker at the time included both persons employed by a member of the household and employed by "a household service business whose services have been requested by a member of the household occupying that residence." 119 Cong. Rec. 24796 (July 19, 1973) (statement of Senator Dominick).

FLSA provides such authority). The "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings" is a "very good indicator of delegation meriting *Chevron* treatment." *United States v. Mead*, 533 US 218, 229 (2001).

In the original proposed rule, 39 Fed. Reg. 35382 (October 1, 1974), the Secretary stated, without qualification or limitation, that the

> "amendments and additions are proposed pursuant to authority in sections 11(c) and 13(a)(15) of the Fair Labor Standards Act, as amended . . . ."

The original final rule was issued just a few months later on February 20, 1975, 40 Fed. Reg. 7404. With respect to numerous elements of the "Interpretations" part of 29 C.F.R. §552, the Secretary conveyed the intention that said rules are legally binding. For example, section 552.100(b) was revised to make it clear that employers cannot credit against wages for the cost of uniforms and their care if they required that the uniforms be worn. 40 Fed. Reg. at 7404 (emphasis added). Similarly, the modification to §552.102(b) "permits the employee's hours to be established by an agreement." Id. (emphasis added).

With respect to the rule at issue in this matter, section 552.109, the Secretary states that the proposed rule "would not have allowed" application of the companionship services exemption to third-party employment. The final rule, on the other hand, establishes that "these exemptions can be available" to such third-party employers. Id. at 7405. These words and phrases connote terms of a binding nature.

The Secretary has made it clear that it intends section 552.109 to be legally binding on employers and employees. *See*, Pet. Ap. 50a-64a at 63a. Department of Labor Wage and Hour Advisory Memorandum No. 2005-1 (December 1, 2005).

Amicus further submits that the home care community considers the entire section 552 to be the absolute and binding rule related to wage and hour laws affecting companionship services. Constituent members of Amicus have structured their business operations around this rule, as home care is a business that is based on labor rather than materials. Compensation levels, work scheduling, price ~~setting, and~~ staff size and composition are built around compliance within federal wage and hour laws under the FLSA.[4] Failure to respect the comprehensive rulemaking process utilized in promulgating 552.109 will lead to "protracted confusion" with the FLSA and any other federal agency action that involves rulemaking. *United States v. Mead*, 533 US at 245 (2001) (Scalia dissent).

State legislatures and labor departments appear to have considered section 552.109 to be binding as well. In response, several expressed their prerogative and have eliminated or modified the exemption. *See, e.g.*, MCL 408.394 Section 14(2)(a) (Michigan Codified Law).

All indications are that section 552.109 was originally and continually intended as binding by the Secretary. This Court should recognize the same and do honor to the extensive rulemaking process utilized by the Secretary over more than 30 years. The judiciary should not substitute its view of the law when this process is

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[4] The Court of Appeal references no evidence that the Secretary ever considered 552.109 as anything but legally binding. *Northwest Ecosystem Alliance, et al v. US Fish and Wildlife Service*, No. 04-35860 (9th Cir. 2007) (Policy statement given Chevron deference even though it was not formulated through notice-and-comment rulemaking or adjudication).

utilized by a federal agency except where the outcome is clearly erroneous. *Auer v. Robbins*, 519 US at 461 (1997) *citing, Robertson v. Methow Valley Citizens Council*, 490 US 332, 359 (1989).

2. Section 552.109 Achieves the Goals of The FLSA Companionship Services Exemption.

Aside from the unambiguous language of 29 U.S.C. §213(a)(15) and the appropriateness of deference to the Secretary's regulatory implementation, 29 C.F.R. §552.109 is a reasonable and rational approach to achieve the goals of the companionship services exemption. By focusing on the infirm and elderly in enacting a companionship services exemption, Congress targets our nation's most vulnerable population. Improving opportunities for the elderly and disabled to remain in their own homes, with their families, avoiding more costly institutional care is the central purpose behind the exemption. *See* 118 Cong. Rec. 24715 (July 20, 1972) (statement of Senator Taft) (noting that certain domestic services are directed to caring for the elderly in their homes and avoiding nursing home placement); 119 Cong. Rec. 24801 (July 19, 1973) (statement of Senator Burdick) (indicating the exemption relates to aged or infirm fathers and mothers who need someone "to take care of them.")

The Secretary's construction of 29 U.S.C. §213(a)(15) supports the goals of caring for the infirm or aged in their own homes. Those goals are not achieved with limits on the nature and identity of the employer. Meeting that need for care should not be impeded by irrational distinctions between caregivers that are employed by the person in the home and those employed by third parties. The point of the companionship services exemption is to assist the infirm and elderly in getting

care because Congress recognized their special needs. This provision is designed to protect the consumer from high costs, not to protect the employer from higher wage obligations.

The Court of Appeals itself recognizes that the companionship services exemption is intended to help make home care for the elderly and infirm more affordable. Pet. Ap. 5a. With this finding, the Secretary's interpretation is certainly "permissible," *Barnhart v. Wilson*, 535 US at 219 (2002) (the interpretation makes considerable sense in term's of the statute's basic objectives) and, at a minimum, meets any "power to persuade" test under *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944); *United States v. Mead*, 533 US at 228 (2001).

It is the care that matters in section 213(a)(15), not the employer. It is for that reason that the Secretary designed 29 C.F.R. Part 552 to "define and delimit" the companionship services exemption so that it applies to employment involving personal care services with minimal allowance for housekeeping (a subset of domestic services) in the home of the person receiving care (not in institutional care settings) and limited to the elderly and disabled ("because of age or infirmity"). To add a qualification limiting the nature of the employer fails to serve the purpose of the exemption.

The Secretary's construction of section 213(a)(15) also avoids the very troubling discriminatory result if this exemption applies only to directly-employed caregivers. While the exemption clearly applies to care for person "unable to care for themselves," the Court of Appeals essentially determined that the exemption is only available when the person unable to care for himself is sufficiently able to take on the daunting tasks required of an employer. That dichotomy stretches the reasoning of the Court of Appeals to an irrational breaking point.

While certain recordkeeping tasks, *e.g.*, 29 C.F.R. §516.34, may not apply, the most taxing responsibilities such as recruitment, training, supervision, and quality control remain for a person "unable to care themselves."

Such discrimination would be at odds with repeated efforts by Congress and the Executive Branch to end disability-based barriers. These efforts include: the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §12101fff. The ADA also includes a mandate in favor as community-based care that complements the goals of the FLSA companionship services exemption. *See, Olmstead v. L.C.*, 527 U.S. 581 (1999).

Congress included no language in 29 U.S.C. §213(a)(15) that supports the proposition that it intended to limit relief from minimum wage and overtime compensation obligation only to those who are mentally and physically able and willing to assume the difficult role of caregiver employer. Instead, it is apparent that Congress intended to offer protection to this vulnerable class as a whole regardless of the nature of the caregiver employer. Section 552.109(a) appropriately carries out this mission.

CONCLUSION

NAHC urges this court to reverse the decision below.

Dated: February 20, 2007, Washington, DC

Respectfully Submitted,

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No. 06-593

In The Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL PRIVATE DUTY ASSOCIATION AS AMICUS CURIAE SUPPORTING THE PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The National Private Duty Association ("NPDA") is a voice for organizations across the nation that provide private home care services, including in-home companionship services. All of the companies that are members of the NPDA share one central guiding philosophy – quality home care services are essential to empowering the elderly to remain in their community where they can lead healthy, dignified, and independent lives. Thus, it is of utmost importance to the NPDA and its members that 29 C.F.R. § 552.109(a), a regulation promulgated by the U.S. Department of Labor (the "DOL") to exempt companionship workers who are employed by third parties from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA"), is found to be valid and enforceable.

The NPDA respectfully submits this amicus curiae brief in support of the petition filed by Long Island Care at Home, Ltd. and Maryann Osborne to review the decision of the United States Court of Appeals for the Second Circuit in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006).[1]

SUMMARY OF THE ARGUMENT

It is imperative that in-home companionship services be kept affordable. The elderly and infirm, some of the most vulnerable populations in our society, require such services to maintain their dignity, health, and independence. The Second Circuit's decision in *Coke*, invalidating 29 C.F.R. § 552.109(a), has the potential to detrimentally impact the affordability of quality in-home companionship services

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[1] On February 1, 2007, the parties filed with the Clerk of the Court a blanket consent to the filing of amicus briefs in support of either party. NPDA certifies that this brief was not authored in any part by counsel for either party and no person other than amicus curiae, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

across the nation, resulting in undesirable alternatives such as institutionalizing our nation's elderly and infirm or subjecting these vulnerable populations to lesser quality care. Our nation's elderly and infirm should have the right to remain in their homes and communities for as long as practicable, a right the Court can preserve by reversing the Second Circuit's opinion, thereby ensuring the continued availability of quality in-home companionship care.

ARGUMENT

Since its adoption in 1975, 29 C.F.R. § 552.109(a) has relieved home care provider agencies of the onerous cost of complying with the FLSA's minimum wage and overtime requirements; which in turn, has afforded millions of working Americans with the opportunity to provide their elderly and infirm family members with in-home companionship services crucial to their loved one's ability to live relatively independent lives in their own homes and communities. Invalidating 29 C.F.R. § 552.109(a) will detrimentally impact the ability of the average worker to afford quality in-home companionship care.

It is projected that within the next two decades, 15.2 million people over the age of 65 will be living alone. *See* U.S. Department of Health and Human Services, Administration on Aging, *Aging into the 21st Century*, at Table 7 (May 31, 1996), available at http://www.aoa.gov/prof/Statistics/future_growth/aging21/aging_21.asp. Moreover, the number of elderly with poor health and the number of disabled are projected to sharply increase during the same time period. *Id.* at "Health Status" and "Disability." Consequently, the number of persons requiring help with at least one activity of daily living, such as bathing, dressing, incontinence care, toileting, eating, and transferring, will also rise sharply. *Id.* at "Summary."

The extension of the companionship services exemption to third party employers through 29 C.F.R. § 552.109(a) is the primary means by which home care provider agencies have been able to keep costs of in-home companionship affordable. Without it, average working adults are faced

with the choice of: (1) staying home to care for their elderly or invalid loved one, which in today's economy is not a viable option for most people; (2) institutionalizing their loved one; or (3) hiring an independent contractor, which places their loved one at a heightened risk of abuse or neglect due to the lack of proper screening, training, bonding, workers' compensation, liability insurance, supervision, and other safeguards offered by legitimate home care agencies. These undesirable alternatives can only be avoided by ensuring that affordable quality in-home companionship care remains available to those that need it.

As a result of the circuit split created by the Second Circuit's decision, in January 2007, the United States District Court for the Eastern District of Virginia certified to the United States Court of Appeals for the Fourth Circuit the very question currently before the Court – "Is 29 C.F.R. § 552.109(a) a valid and enforceable regulation." *Hanley v. Hand 'N Heart, L.L.C.*, (Nos. 4:06cv71 and 4:06cv143), 2007 WL 201088, at *13 (E.D.Va. Jan. 22, 2007). In *Hanley*, the District Court concluded that contrary to the Second Circuit's decision in *Coke*, which the District Court found to be unpersuasive, 29 C.F.R. § 552.109(a) is valid and enforceable regardless of whether it is considered a legislative or interpretive regulation. *Id.* In reaching this conclusion, the District Court noted, among other considerations, that:

> The companionship services exception ... promotes the availability of companionship services. Congress did not intend to place a heavy burden on working adults who are responsible for elderly or infirm relatives and who would be unable to afford domestic companionship services at overtime wages. *See* 2005 Wage & Hour Memo. at 2 (citing 119 Cong. Rec. at 24,797 (Sen.Dominick); *id.* at 24,798 (Sen.Johnston); *id.* at 24,801 (Sen.Burdick); Opinion Letter, Wage & Hour Div., Dep't of Labor, WH-368, 1975 WL 40991 (Nov. 25, 1975) ("Congress was mindful of the special problems of working fathers and mothers who need ... a person to care for an elderly invalid in their home.")). Senators

> Dominick and Johnston agreed that the exemption was necessary to avoid making domestic companionship services unaffordable to working class adults, who would then be required to care for their elderly or invalid family members on their own time and thus be unable to maintain employment themselves. 119 Cong. Rec. at 24,797-24,798. In earlier debate on the application of the federal minimum wage to companionship services, Senators Taft and Dominick feared that FLSA coverage of companionship services would force families to resort to the services of a nursing home. 118 Cong. Rec. 24,715. While the DOL initially proposed to limit the exception to employers not otherwise covered by the FLSA, both the 1974 proposal and the regulation adopted in 1975 created a class of domestic service employees who were not subject to the FLSA if they were providing companionship services. The economic impact of applying the FLSA to companionship services also persuaded the DOL to abandon its 2001 proposal to deny the companionship exemption to third-party employers altogether. *See* Application of the [FLSA] to Domestic Service, 67 Fed. Reg. 16,668 (Apr. 8, 2002) ("[N]umerous commentators on the proposed rule, including multiple government agencies such as the Small Business Administration and the Department of Health and Human Services, seriously called into question the Department's conclusion that [the proposal would have] little economic impact."). It is understandable that these considerations were persuasive to the DOL, as they are certainly persuasive to the Court. To the extent that these concerns apply to families caring for their elderly or infirm, they also necessarily apply to the elderly and infirm themselves. If the elderly or infirm, who are likely on fixed or otherwise-limited incomes, can obtain companionship services by their own means, then this would further reduce the burdens on their families.

Id. at *12.

Invalidating 29 C.F.R. § 552.109(a) will decrease the availability of quality home companionship services and will likely subject millions of our nation's elderly and infirm to institutionalization and a lesser quality of care. Such an unreasonable result can be prevented by overruling the Second Circuit's erroneous decision invalidating the rule.[2]

CONCLUSION

For the reasons stated above, the NPDA respectfully requests that the Court overrule the Second Circuit's decision in *Coke v. Long Island Care at Home, Ltd.* (No. 03-7666), 462 F.3d 48 (2nd Cir. 2006).

Respectfully submitted,

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[2] To avoid unnecessary repetition, the NPDA joins in the numerous other arguments presented by the Petitioners and other amicus curiae in favor of overruling the Second Circuit's decision.

No. 06-593

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD, ET AL.,

Petitioners,

v.

EVELYN COKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE URBAN JUSTICE CENTER, BRENNAN CENTER FOR JUSTICE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, LEGAL MOMENTUM, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AND AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[*]

Amici are ten non-profit legal advocacy organizations from across the nation that share a longstanding commitment to promoting civil rights, economic opportunity, and fair treatment in the workplace for all – especially women, people of color and immigrants. See Appendix (describing *amici*).

Amici have a strong interest in seeing that the Fair Labor Standards Act is correctly interpreted here, so that company-employed home health care workers – typically, African-American and Latina women working to support families – are not denied modest, but vitally important, congressionally-intended wage protections.

STATEMENT

This case concerns whether a provision of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, relieved a commercial enterprise of its obligation to pay the federal minimum wage and overtime premiums to employees who provide health care in customers' homes – or empowered the Labor Department to legislate such an exemption.

1. *Statutory Background.* Congress enacted the Fair Labor Standards Act in 1938, responding to President Roosevelt's call for a law "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work," see S. Rep. No. 75-884 at 2. Based, *inter alia*, on a congressional finding that low wages and long work weeks are "detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202, the law requires that employers pay covered individuals – originally those employees "engaged in commerce or in the production of goods for commerce," Fair Labor Standards Act of 1938, ch. 676, §§ 6(a), 7(a) – a minimum

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[*]No counsel for any party authored any part of this brief, and no person or entity other than *Amici* or counsel made a monetary contribution toward its submission. The parties have filed blanket consents to *amicus curiae* briefs.

wage and a premium for overtime work. See 29 U.S.C. §§ 206, 207.

Although "[t]he Act declared its purpose in bold and sweeping terms [and] [i]ts scope was stated in terms of substantial universality," *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950), African-American workers were largely excluded from its protections. At a time when 65 percent of black Americans worked in either agriculture or domestic service, neither category of employment was covered.[1] Agriculture was expressly exempted, see 1938 ch. 676, § 13(a)(6), and domestic service fell outside the stringent coverage test, which had been initially drafted in the shadow of the Court's restrictive understanding of the federal Commerce Clause power. See Palmer, *Outside The Law: Agricultural and Domestic Workers Under The Fair Labor Standards Act*, 7 J. POLICY HIST. 416, 417 (1995).

This pattern of coverage was of a piece with that in other labor and social reform legislation enacted during the New Deal. In order to satisfy the staunch segregationists who controlled the levers of congressional power at the time, explicit exclusions for agricultural and domestic service workers were included in the National Labor Relations Act, ch. 372, § 2(3) (1935), and the Social Security Act, ch. 531, tit. II, § 210(b)(1)-(2) (1935), and New Deal relief legislation was carefully crafted and administered to ensure that decisions about assisting black citizens would be made by local officials in the South. See A. BADGER, THE NEW DEAL 252-53 (1989); J. QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 115-16 (1988); H.

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[1]By 1940, 60 percent of all black female workers were domestic servants, as compared to only 10 percent of all white women workers. J. JONES, LABOR OF LOVE, LABOR OF SORROW 200 (1995). This disproportion was even larger in the South. See D. KATZMAN, SEVEN DAYS A WEEK: WOMEN AND DOMESTIC SERVICE IN INDUSTRIALIZING AMERICA 290-91 (1981); *id.* at 185 ("In the South, domestic service was a complex system that was part of the racial caste structure").

SITKOFF, A NEW DEAL FOR BLACKS 52 (1978).[2]

In addition to accommodating prevailing racial prejudices, these laws' treatment of domestic service workers reflected stereotypical assumptions about the nature of household work – that the relationship between employer and "servant" was "personal," rather than commercial, in character; that employment within a household was not "real," productive work; and that women did not work to support their families. See P. PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945 at 12 (1989); Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 880-918 (1999); KATZMAN, *supra* at 265-77.[3]

The discriminatory treatment provoked strong opposition from civil rights groups. Dean Charles Houston testified on

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[2]Even these exclusions did not appease the most stalwart segregationists, who objected to the principle that covered black and white workers would receive the same wage. Speaking against the FLSA, Representative J. Mark Wilcox of Florida stated:

> Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted * * * * You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge * * * * This is just another instance of the well-intentioned but misguided interference of our uninformed neighbors in a delicate racial problem that is gradually being solved by the people of the South.

82 Cong. Rec. 1404 (1937) (quoted in Linder, *Farmworkers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1374-75 (1987)). Cox concluded by likening the law to pending federal anti-lynching legislation, *i.e.*, a "political goldbrick for the Negro."

[3]Thus, State employment and welfare statutes, which were not subject to Commerce Clause constraints, often exempted domestic workers, and even labor laws passed to protect women workers drew a line between industrial and domestic workers. See Smith, 48 AM. U. L. REV. at 853-55 & n. 15.

behalf of the NAACP at the congressional hearings concerning the Social Security Act that statutory exemptions for farm workers and domestics made that law "look[] like a sieve with the holes just big enough for the majority of Negroes to fall through," Hearings on S. 1130, Sen. Finance Comm., 74th Cong., 1st Sess. 644 (1935); and a witness representing the National Negro Congress at the 1937 FLSA hearings complained about the exclusion of "Negro domestic and agricultural [workers] – representing the bulk of Negro labor." Joint Hearings Sen. Educ. and Labor Comm. & House Labor Comm., 75th Cong., 1st Sess. 571 (1937).[4] These groups worked tirelessly afterward to attract the attention of the various branches of the government to the dire economic straits of and intolerable employment conditions of domestic workers, see Goluboff, *The Thirteenth Amendment And The Lost Origins of Civil Rights*, 50 DUKE L. J. 1609, 1678 (2001); Palmer, *Outside The Law*, *supra*, at 427-28, persuading Congress to amend the Social Security Act in 1950 to require households to make social security payments on behalf of their domestic employees. See Pub. L. 81-734.

Amendments to the FLSA enacted in the 1960s brought meaningful numbers of employees in domestic service within that statute's protections for the first time. By extending minimum wage and overtime protections to all individuals "employed in an enterprise" of a certain size, 29 U.S.C.

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[4] While the most politically powerful opponents of racial equality in federal law were Southerners, domestic work in other parts of the country was considered the province of women from other racial backgrounds, see Palmer, *Outside the Law*, *supra*, at 420 & n.13, and the exclusionary provisions drew support from Western agribusiness interests, who employed a predominantly Mexican-American workforce, *id.* See C. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941 at 261 (1981) (legislation helped "transform[] farmworkers into * * * what was for all practical purposes a rural caste"). When the FLSA was amended in 1966 to provide minimum wages for farm workers, Congress recognized that immigrant laborers were the largest and most vulnerable segment of this workforce. S. Rep. No. 89-1487 (supp. views of Sens. Williams and Javits).

§ 203(r), (s), the 1961 and 1966 Amendments, Pub. L. Nos. 87-30 § 2 and 89-601 § 102, ensured that domestic service workers employed by substantial firms and agencies, rather than individual households, would be covered.[5]

Domestic workers employed by households were finally granted FLSA protection under the 1974 Amendments, see Pub. L. 93-259 § 7, which also brought numerous other categories of workers within the Act's coverage.[6] Extension of coverage to domestic service employees was enacted only after substantial debate. An amendment removing a similar provision from a predecessor had been narrowly approved by the House in 1972, see 118 Cong. Rec. 11,393 (1972), and opponents of extension expressed doubt about whether the Commerce Clause empowered Congress to regulate employees of households and complained that coverage would impose intolerable administrative burdens on "housewives." See, *e.g.*, S. Rep. No. 93-300 at 121 (minority views). Opponents also objected to treating services provided occasionally or informally by teenagers, friends, and neighbors, as equivalent, for FLSA purposes, to the kind of formal, bread-winning employment relationships the Act was meant to govern. See, *e.g.*, 119 Cong. Rec. 24,797 (1973) (Sen. Dominick).

Highlighting statistics showing that almost all domestic service workers were female and most were either African American or members of disadvantaged immigrant groups, proponents of extended coverage invoked considerations of racial justice and gender equality. See 119 Cong. Rec. 18,341 (1973) (Rep. Griffiths) ("Women, especially black women,

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[5]The 1966 Amendments also limited the long-objected-to agricultural worker exclusion and increased by 7.2 million the total number of workers entitled to FLSA protection. See S. Rep. No. 89-1487 at 3.

[6]In addition to extending coverage for governmental employees, see *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985), the law eliminated exemptions for, among others, employees of telegraph agencies, seafood canners, nursing homes, bowling establishments, cotton gins and sugar processors, see Pub. L. 93-259 §§ 8-20.

simply have not had a fair shake in the job market. It is time they were given their due"). They responded that the record-keeping was comparable to that already required of household employers under the Social Security Act and disclaimed interest in extending the FLSA to the kinds of marginal cases raised by opponents, agreeing that neither casual babysitters nor individuals paid to spend a few hours in the home of an aged neighbor, "elder sitters," would be covered under the new provision. See 119 Cong. Rec. 24,801 (1973) (statements of Sens. Williams and Burdick).

As enacted, Section 7 of the 1974 measure included a congressional finding, codified at 29 U.S.C. § 202(a), "that the employment of persons in domestic service in households affects commerce," along with new subsections to the minimum wage and overtime provisions, see §§ 206(f), 207(*l*). It also provided that individuals "employed on a casual basis in domestic service employment to provide babysitting services or employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)," 29 U.S.C. § 213(a)(15), would remain uncovered. The Act did not amend or revisit the "enterprise" coverage provisions, apart from adding language to section 3(r)(2)(c), reflecting newly-expanded coverage for public employees.

In 1975, DOL issued rules for the newly added coverage, see 29 C.F.R. Pt. 552, announcing that "[t]he definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6," 40 Fed. Reg. 7,404, 7,405. Section 552.6 defines the term "companionship services." Section 552.3 states that "[a]s used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." See also 29 C.F.R. § 552.101(a).

Included among the "interpretations and statements of policy" in the DOL's final Federal Register notice was a newly-worded provision, 29 C.F.R. § 552.109(a), declaring that "by virtue of section 13(a)(15)," third-party employers of workers providing companionship services – including firms already covered under the Act's "enterprise" provisions – need not pay these employees the federal minimum wage or comply with the Act's overtime pay provisions. The notice acknowledged that the agency's originally-proposed version had taken the precisely opposite approach, *i.e.*, that individuals who provide companionship services in the home as employees of a firm "qualify[ing] as a covered enterprise under Sections 3(r) and 3(s)(1) of the FLSA" would remain protected. See 39 Fed. Reg. 35,385 (1974). By way of explanation, DOL quoted the statute's reference to "'any employee,'" 40 Fed. Reg. 7,405 (quoting § 213(a)(15)), and described excusing these enterprises from FLSA obligations as "more consistent with the statutory language" and with "prior practices concerning other similarly worded exemptions." *Id.*

2. *The Home Health Care Industry.* As government statistics and the briefs of other *amici* attest, for a large and fast-growing number of Americans, the home care of today is largely provided by home health care workers employed by substantial business enterprises. An estimated 62 percent of home health care aides work for the thousands of for-profit companies in the field, see Montgomery, et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45:5 GERONTOLOGIST 593, 597 (2005).

As with other forms of domestic service, home health care work is performed by a labor force that is overwhelmingly female, with women from racial and ethnic minority backgrounds disproportionately represented. See Univ. Cal. San Francisco, Ctr. for Cal. Health Workforce Studies, *An Aging U.S. Population & The Health Care Workforce* (2006) Table B2 (89 percent of home health care workers are female;

34 percent are African American; 18 percent are Latina and 20.4 percent are immigrants). Many of these women are heads of households, with responsibilities for young children (and often for their own aging parents). See Testimony of William J. Scanlon, Director, Health Care Issues, G.A.O., *Nursing Workforce, Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern: Testimony Before the Senate Committee on Health, Education, Labor and Pensions* 22 (released May 17, 2001) ("Scanlon Testimony ").

The work responsibilities of home health aides are stressful, physically demanding – yielding high rates of occupational injury – and often unpleasant. In addition to "duties, such as emptying bedpans and changing soiled bed linens," U.S. Dept. Labor, Occupational Outlook Handbook 2006-2007, at 399, workers often must travel to multiple client homes in a single work day, and are called upon to provide services to individuals who are "abusive, depressed, or otherwise difficult" and balance conflicting demands of clients, agency employers, medical professionals, and clients' family members. *Id.*

Earnings of home care workers "remain among the lowest in the service industry," 66 Fed. Reg. 5,483 (Jan. 19, 2001); see Occupational Outlook Handbook at 353, 400. Median earnings for all home health care workers were $12,265 in 2001, Scanlon Testimony at 24 Table 3, and median earnings for those working on a full-time, full-year basis were below the federal poverty level for a family of four, *id.*; see 66 Fed Reg. 10,695 (H.H.S. poverty guidelines 2001). Large numbers of home health worker families receive food stamps, Scanlon Testimony at 22, and they receive Medicaid at much higher rates than other workers, *id.* at 13. As with others in domestic service, few home health workers receive retirement or other employment benefits; they have few opportunities to advance into higher-paying, higher status work; and they lack amenities and protections available to those who work in more conventional commercial work environments.

3. *Proceedings Below.* Respondent Evelyn Coke, a home health care worker, filed this suit against her former employer – a for-profit corporation employing approximately 40 home health aides – alleging that they violated the FLSA by paying her less than minimum wage and failing to pay extra compensation for overtime work. See J.A. 21 (Complaint); *id.* 19-20 (petitioner satisfied requirements for FLSA enterprise coverage). The employers, citing the Labor Department's § 552.109(a) interpretation, asserted that Ms. Coke's employment was exempt under § 213(a)(15).

After the district court sustained that defense, Pet. App. 46a, the Court of Appeals reversed. The court first held that the DOL "interpretation" was not entitled to judicial deference – both because the agency had not in fact exercised its congressionally-delegated power to "define and delimit" the statutory exemption in issuing it and because the rule conflicts squarely with the provision, § 552.3, that the Labor Department *did* promulgate in exercise of those legislative rulemaking powers. Finding the agency's explanation of its action ignored both this conflict and "the plain language of the statute," Pet. App. 32a, the court held that it lacked even the power to persuade, and was therefore unenforceable.[7]

The Second Circuit reaffirmed this conclusion, after this Court directed it to reconsider the judgment in light of an intervening DOL "Advisory Memorandum." Pet. App. 3a. That agency policy statement was not itself owed *Chevron* deference, the court reasoned, and the general rule favoring agency interpretations in cases of regulatory ambiguity did not support a different outcome. The Memorandum's claim – that the regulatory phrase "services of a household nature performed by an employee in or about a private home * * * *of the person by whom he or she is employed*." 29 C.F.R. § 552.3 (emphasis in

[7] The Court of Appeals affirmed the district court's dismissal of Respondent's facial challenge to the "companionship" regulation, § 552.6, Pet.App.15a-22a.

opinion) was "ambiguous" and could be "interpreted" to mean "services performed by an employee [of an enterprise] in or about a private home" – was, the court concluded, itself untenable. Pet. App. 5a (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

SUMMARY OF ARGUMENT

The Court of Appeals properly rejected the employers' claim of FLSA exemption. As its decisions recognized, a necessary predicate for judicial deference to agency law-making is lacking here because the Department did not in fact exercise its delegated authority in issuing its third-party employer policy. And as respondent emphasizes, the efforts of petitioners and the government to rehabilitate DOL's 1975 regulatory process (and their highly abstract quarrels with the Second Circuit's discussion of *Chevron*) cannot overcome a critical fact: that § 552.3, a DOL regulation that *was* lawfully and unambiguously promulgated under the § 213(a)(15) authority, plainly rejects the notion that agency-employed health care workers may be paid less than minimum wage.

But petitioners' argument suffers from an even more fundamental problem. It is axiomatic that even the most "self-conscious" exercise of administrative lawmaking still requires proof that Congress intended to confer the authority claimed. The policy at issue here fails at that threshold. The power petitioners assert for the Labor Department is not the familiar one of marking the boundary between those newly covered domestic service employees and those who, by virtue of an exception, would remain uncovered. Rather, because (as all parties here recognize) Congress had *already* extended FLSA protection to companions and other domestic service employees in "enterprise" employment, they read § 213(a)(15) as delegating power to remove coverage from employees who were already entitled to the minimum wage and overtime.

As this Court's statutory interpretation cases make clear, it makes little sense to construe an amendment adopted to *expand*

a statute's reach as having effected (or authorized) a contraction in coverage. And what is implausible in the abstract becomes utterly untenable when the statute identified as the source of agency power here – the 1974 Amendments – is examined.

The text, structure, and history of that enactment preclude reading § 213(a)(15) as authorizing withdrawal of FLSA coverage for previously protected workers. Congress's only aim with respect to domestic service workers was to extend coverage to those whom the Act had previously left out, and it intended § 213(a)(15) as setting an outer limit on the most far-reaching applications of that extension, with the required DOL regulations laying down the precise metes and bounds. There simply is no evidence of some freestanding authorization to exempt large, profit-making employers whose economic activities are at the heartland of Congress's legislative jurisdiction. Even the sentiments expressed by ardent opponents of "domestic service" coverage confirm this understanding: these legislators invoked the need to protect the interests of "private households," not businesses, and no Act opponent proposed revisiting, let alone repealing, enterprise coverage for firms providing domestic services.

Petitioners' only real response is a curious claim that invalidating § 552.109(a) would itself precipitate a coverage gap, leaving domestic service workers whose employers have not attained the "enterprise" threshold without congressionally-intended protections. But this "danger" (which was not even mentioned by the agency when it acted in 1975 or 2002) is a chimera. This case concerns only the meaning of the § 213 exemption – not the statute's coverage provisions. If, as all parties appear to agree, Congress meant for all (non-companion, non-babysitter) domestic employees to be paid the minimum wage, no principle of statutory construction or administrative law would require DOL to adopt an interpretation contrary to that intent.

The reasons relied on below and general statutory

interpretation principles fully suffice to render the DOL policy unenforceable, but the jarring inconsistency between the administratively-created third-party exemption and the policy judgments and purposes reflected in the FLSA – and the 1974 Amendments, in particular – are further grounds for rejecting § 552.109(a).

The rule petitioners ask the Court to approve – which seeks to use power conferred in legislation that reached inside the household to safeguard vulnerable workers to relieve commercial enterprises of a preexisting obligation to pay minimum wages – is unreasonable on its face, and it is especially so in light of the distinct and special concerns that led Congress to act in 1974. In cases interpreting the FLSA, this Court has repeatedly and properly highlighted the statute's "remedial" character. The purposes of the 1974 coverage Amendments were also "remedial" in a further sense. Congress viewed them not only as improving the material well-being of domestic service employees and their families, but as a conscious recognition of the equal status of these minority women and of the full dignity of their work. Against this background, petitioners' "policy" arguments for the rule – that paying sub-minimum wages to direct care workers would help keep health care costs down or that giving effect to the principle reflected in § 552.3 will abridge their "freedom" to work long hours without overtime pay – only serve to highlight its incompatibility with the FLSA.

ARGUMENT

I. The Labor Department's Rule Purporting to Relieve All Third Party Employers of Companions of Their FLSA Duties Is Not a Lawful Exercise of Any Power Delegated By Congress

Petitioners argue that the policy denying coverage to all workers providing companionship services, even those employed by "enterprises" within the meaning of § 203(s)(1), represents a valid, legally binding exercise of authority

conferred by the 1974 Act. This argument fails, however, because (1) the DOL did not in fact exercise its rule-making authority in issuing § 552.109(a) and, more important, (2) the 1974 Act gave it no such authority to withdraw FLSA coverage from workers Congress had acted to protect.

As the Second Circuit explained, there is no need to decide whether an exemption like the one on which petitioners rely lawfully *could have been* adopted pursuant to the § 213(a)(15) delegation, but see *infra*, because it is clear that the agency interpretation was not in fact "'promulgated in the exercise of that authority.'" Pet. App. 26a (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). And as respondent shows (Br. 24-34), petitioners' efforts to construct a revisionist account of the 1975 agency proceedings – and their academic arguments about when *Chevron* deference does and does not attach – depend on the Court's ignoring this central fact: that the Department *did* explicitly (and properly) take up the responsibility of "defin[ing] and delimit[ing] the * * * terms" at issue here, when it promulgated § 552.3. See 29 C.F.R. § 552.2(c) ("The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6"). The express terms of that regulation respect the distinction between companions employed *by* households and those performing services *in* households in the employ of third parties: "As used in section 13(a)(15) of the Act, the term 'domestic service employment' refers to services * * * performed * * * in or about a private home * * * of the person by whom he or she is employed." As the decision below and respondent's brief both highlight, petitioners' extravagant claims for § 552.109(a) must be evaluated – and rejected – in light of the universal agreement that § 552.3 does have the "force of law," Pet. Br. 10.[8]

[8]Nor is the analysis affected in any way by the grant of authority to "prescribe necessary rules, regulations, and orders with regard to the amendments made by [the 1974] Act." Pub. L. 92-259, § 29(b). That provision does not make § 552.3 less valid or binding, nor does the generic grant mitigate the fundamental, substantive defect in § 552.109(a) discussed

Even leaving § 552.3 aside, the broad "interpretation" of § 213(a)(15) advanced in § 552.109(a) would be deeply suspect. Even employment statutes that include express exemptions generally do not allow otherwise-covered, third-party employers to stand in their (exempt) customers' shoes. See, *e.g.*, *Shore Club Condo. Ass'n v. NLRB*, 408 F.3d 1336, 1340 (11th Cir. 2005) (condominium association could not rely on NLRA's exclusion of "domestic employees" to defeat claims by its employees providing housekeeping services); see also *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516-17 (1973) (employer's size, not that of its customers, determines FLSA "enterprise" coverage). An "interpretation" that allows for-profit businesses to pay hard-working employees at the bottom rung of the ladder sub-minimum wages would be both at odds with the long recognized purposes of the FLSA, see, *e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985), and out of alignment with the the Act's other exemption provisions and with the interpretation given the other clause in the same provision, see *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps").[9] As respondent explains (Br. 5-10), the DOL interpretation hardly falls "unmistakably within [the] terms and spirit," of the congressionally-enacted exemption, *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). See pp. 21-26, *infra* (discussing applicability of narrow construction canon). Indeed, the terms of § 213(a)(15) point to an exclusive focus on household employers. See § 552.101(a) (explaining that "domestic service *employment*" had an "accepted meaning") (emphasis added); 26 U.S.C. § 3510.

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infra. Cf. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88 (2002) (a regulation is not "necessary" if contrary to a law's purpose and design).

[9]DOL policy treats employment of a babysitter "by [an] agency other than the family or household using their services" as categorically beyond the reach of the exemption that is paired with "companion[ship]" in § 213(a)(15) on the ground that "such employees are engaged in this occupation *as a vocation*." See 29 C.F.R. § 552.103(b) (emphasis added).

But the problems with the administratively-created exemption on which petitioners rely go beyond having "drawn the line" between newly-included and still-unprotected workers in the wrong place. Cf. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting "interstitial" character of legal questions resolved by agency). Rather, because it is beyond dispute that home health care workers (and other domestic service workers) employed by substantial enterprises were protected under the FLSA at the time of the 1974 Amendments, petitioners' defense of § 552.109(a) depends on showing that Congress delegated to the agency the power to withdraw previously provided coverage. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); *Board of Govs., Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 & n.6 (1986) (an agency's enforcement authority "only permits [it] to police within the boundaries of the Act; it does not permit the [agency] to expand its jurisdiction beyond the boundaries established by Congress"); accord *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). By ignoring this threshold requirement, it is petitioners who "put[] the cart before the horse," Pet. Br. 23.

It is common ground that, had the 1974 Amendments never been enacted, the FLSA would entitle home health care workers employed by substantial businesses to minimum wage and overtime pay. The DOL repeatedly relied on the 1961 and 1966 Amendments, which provided for FLSA coverage on an "enterprise" basis, to enforce the Act's wage and hour requirements against third-party home care and domestic staffing agencies, see *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362 (5th Cir. 1973); *Homemakers Home & Health Care Servs., Inc. v. Carden*, 538 F.2d 98 (6th Cir. 1976) (employees of firm providing domestic worker and health care

services); Wage and Hour Opinion Letter 174, 1972 WL 34917 (Aug. 20, 1972) (rejecting argument that "retail establishment" exemption formerly codified at § 213(a)(2) excused firm employing "domestics, babysitters, live-in companions * * * and home health aid[e]s" from paying FLSA wages); Wage and Hour Opinion Letter 147, 1971 WL 33084 (Nov. 17, 1971) (affirming that employees of enterprise "engaged in the business of providing temporary help in the home and health care field" were covered).[10]

In both 1974 and 2001, DOL recognized that domestic workers employed by qualifying "enterprises" had been covered before the Amendments, see 39 Fed. Reg. 35,385 (1974); 66 Fed. Reg. 5,485. Although, on both occasions, the Department later retreated from the logical conclusion that "denial of the Act's protection to previously covered * * * employees" "was not the purpose of those Amendments," 39 Fed. Reg. 35,385, neither DOL nor petitioners dispute that many of the employees they seek to exclude under the administratively-created "exemption" would be entitled to minimum wage and overtime pay had the 1974 Amendments not been enacted into law.

The notion that Congress conferred power to withdraw coverage from workers whose employment already entitled them to FLSA protections suffers from a series of grave difficulties. First, as this Court's cases have long recognized, the general rules of statutory construction disfavoring repeals by implication apply with special vigor to laws enacted, as the 1974 statute undeniably was, for the purpose of extending a statute's reach. Thus, in *Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 133-34 (2003), the Court rejected a claim of municipal immunity from suit under the False Claims Act that was grounded on statutory amendments whose "basic purpose" had been "to make that law a 'more useful tool'" (citation

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[10]The provision on which these employers (unsuccessfully) claimed exemption was *narrowed* by Congress 1974, see *Homemakers*, 538 F.2d at 101 n.4, and repealed entirely in 1989. See Pub. L. No. 101-157 § 3.

omitted)). "It is simply not plausible," *Chandler* explained, "that Congress intended to repeal municipal liability sub silentio by the very Act it passed to strengthen the Government's hand." *Id.* Accord *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (refusing to treat "representative" as a term of limitation when Congress had amended the Voting Rights Act to expand its coverage).

Likewise, in *Director, Office of Workers Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 319 (1983), the Court rejected an argument that a provision included in a statute enacted to expand the coverage of the Longshore and Harbor Workers' Compensation Act could be read as authorizing exclusion of workers who qualified for protection under that law's pre-amendment "situs" test. Explaining that the newly included "status" test was meant to delimit the class of newly-protected workers, the Court held the added language could not be read "to affect adversely the pre-1972 coverage." *Id.* at 323. Cf. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62-63 (2004).

The contraction Congress is claimed to have authorized here, involving a class of employment relationships that are within the heartland of Congress's Commerce Clause jurisdiction (and lack any attributes that made extending the FLSA to household employers controversial), is substantively implausible. See *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 245 n.9 (2002) (rejecting interpretation that would leave regulatory "gaps * ** plainly inconsistent with the purpose of the [Occupational Safety and Health] Act"). That such contraction would be accomplished through the oblique means of the § 213(a)(15) delegation would be unusual in itself. *See MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 (1994).

The mounting implausibility of petitioners' defense of § 552.109(a) achieves effective impossibility when the law that is claimed to be the source of this power – the 1974 Act – is examined. As with the "[i]nterpretive Rule" rejected in

Gonzales v. Oregon, 126 S. Ct. 904 (2006), the one disputed here "is persuasive only to the extent one scrutinizes the [ostensible authorizing] provision without the illumination of the rest of the statute." *Id.* at 925 (citing *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989)). See *Corning Glass Works v. Brennan*, 417 U.S. 188, 198 (1974) ("The Fair Labor Standards Act, [should be read with] 'regard for the specific history of the legislative process that culminated in the Act'" before the Court) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)).

The difficulty of inferring an intent to contract coverage (or to authorize agency contraction) from the 1974 Amendments begins with the statute's preamble, declaring Congress's aim "to expand coverage of the [FLSA]," Pub. L. 93-259, and section after section of the 1974 measure extends coverage to previously unprotected workers. Moreover, it expands the very "enterprise" provisions the Department claims power to narrow. See *id.* § 6 (extending Act to employees of state and local governments).[11] The House Committee Report includes a lengthy historical account of the FLSA's evolution, which begins by lamenting the statute's failure to attain or even approach "'substantial universality'" in coverage, see H.R. Rep. 93-913 at 7 (quoting *Powell*, 339 U.S. at 516), and – after quoting pleas and proposals for expanded coverage by Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson – concludes with a declaration of intent "to exten[d] the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as is presently practicable." *Id.*[12]

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[11] As noted above, the 1974 Act narrowed the one exemption – since repealed altogether – that businesses employing home health care workers had cited, unsuccessfully, as allowing them to pay employees below-minimum wages.

[12] On the rare occasions when Congress has decided to reduce coverage, it has made its intent explicit. See, *e.g.*, Pub. L. 85-231 (1957) ("sections 6, 7, 11, and 12 shall not apply with respect to any employee whose services * * * are performed in a workplace within a foreign country" or other

Congress's intent that the § 213(a)(15) exemption operate only as a limitation on the newly extended reach is evident from the structure of the statute, which included within a single section, the new basis for federal regulation – the congressional finding that "domestic service affects commerce," See Pub. L. 93-259 § 7(a) – the provisions extending coverage to domestic service employees, *id.* § 7(b)(1)(2), and the exemption, *id.* § 7(b)(3). The enactment history, committee reports and the DOL regulations all confirm the understanding that § 213(a)(15) was not meant to reach beyond the class of previously-unprotected workers. See S. Rep. No. 93-300, at 20 (describing proposal as "bring[ing] under the * * * the Act all employees in private household domestic service earning 'wages' * * * for purpose of the Social Security Act, except babysitters"); *id.* at 22 (describing "such activities as babysitting or acting as a companion" as not included "within the term 'domestic service'"). The text of the regulations is similarly explicit in linking § 213(a)(15) to §§ 6(f) and 7(*l*). See 29 C.F.R. § 552.2.

This understanding is evident in the congressional debates, in which the circumstances of household-employed "companions" and babysitters were repeatedly described as being at (or beyond) the margins of the newly asserted congressional power, because they were casual employees working on an itinerant basis and not to support their families. See H.R. Rep. No. 93-913 at 36 (employees in excluded categories were not "regular bread-winners or responsible for their families support"); S. Rep. No. 93-358 at 27 (same). See also 119 Cong. Rec. 24,801 (1973) (Sen. Burdick) (observing that, unlike "the professional domestic who does this as a living," many individuals pay a "neighbor [who] comes in and

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enumerated U.S. jurisdictions).

sits with" an elderly parent).[13] Congress understood that the exemption codified at § 213(a)(15) to be consistent with the Act's objective, "to include within the coverage of the Act *all employees whose vocation is domestic service*." S. Rep. No. 93-690 at 20 (emphasis added).

Without any affirmative basis for claiming that the Ninety-third Congress sanctioned relieving third-party commercial employers of their existing FLSA obligations, petitioners and their *amici* construct a circuitous argument, designed to depict § 552.109(a) as the lesser of two evils. Interpreting § 213(a)(15) as excusing only household employers of companions of their FLSA obligations, they insist, would itself lead to a gap in coverage – with other domestic service employees of non-enterprise third parties losing out on wage and hour protection. See Pet. Br. 32, 36; U.S. Br. 28.

The "danger" these parties claim to have averted is one entirely of their own invention. By its own terms, the definition of "domestic service employment" in § 552.3 (like the 552.109(a) "interpretation") applies *only* to the statutory exemption provision. And, given that (as all parties agree) Congress meant for the (non-companion) domestic employees in question to be covered under §§ 206 and 207, no known principle of statutory construction or administrative law would compel the agency to adopt an "interpretation" of those provisions contrary to its understanding of Congress's specific intent. Nor does the fact that the words "domestic service" appear in both the coverage and the exemption provisions make the "threat" credible. The rule of construction to which these arguments appeal – that identical words used in a statute are generally intended to have the same meaning – is hardly an absolute, see, *e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342

[13] In their efforts to exclude *all* domestic workers employed by householders from coverage under the Act, opponents sought to portray a teenage neighbor's mowing the lawn as representative of the kind of work that would be regulated. See, *e.g.*, 119 Cong. Rec. 24,797 (Sen. Dominick).

(1996) (interpreting "employee" differently in different parts of Title VII), but its only application is to situations where terms are in fact *identical*, which "[d]omestic service" and "domestic service employment" are not. When, as here, provisions use similar-sounding, but *non*-identical terms, very different canons come into play – those requiring that "every word" in a statute be given "some operative effect," *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992), and that differences in wording should be treated as legally meaningful, see, *e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (broadly construing the phrase "involving commerce" in the coverage provision of the Federal Arbitration Act, while giving the phrase "'engaged in * * * commerce,'" which appears in the law's exemption provision, a narrow reading). These rules of construction resonate here because, as respondent shows (Br. 8), the phrase "domestic service employment" is in fact a term of art, with a distinct, settled meaning.

II. Exemptions With Respect to Domestic Workers Must Be Construed In Light Of the Historic, Remedial Purposes of The 1974 Amendments

As explained above, this case may be resolved without reaching the stage when the canon requiring that FLSA exemptions be construed narrowly would be operative, see, *e.g.*, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), but application of that rule would surely invalidate § 552.109(a). Congress did not "unmistakably" indicate that third-party employers of companions should be exempt from FLSA obligations. See *A.H. Phillips*, 324 U.S. at 493. As discussed, it did not intend such a regime at all, and the text of § 213(a)(15) does not support that interpretation.

Not surprisingly, therefore, petitioners and *amici* do not assert that they can prevail under the normal rules applied to FLSA exemptions. Rather, they claim (Pet. Br. 32 & n.12) that such canons are inapplicable on the basis of the inventive "gap-

avoidance" theory – their claim that Congress's acknowledged purpose of "'includ[ing] within the coverage of the Act all employees whose vocation is domestic service,'" U.S. Br. 28 (quoting S. Rep. No. 93-690 at 20), is advanced by interpreting § 213(a)(15) to broadly *exclude* large numbers of such employees, including respondent. As discussed above, the purported need to avoid this gap is wholly contrived and is thus no impediment to applying the normal rule that exemptions to the FLSA are to be construed narrowly and against the employer. See *Arnold*, 361 U.S. at 392; *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959).

In fact, the reasons for applying such a rule have special force here. First, as this Court has explained, the principal rationale is that FLSA is "remedial legislation," see *A.H. Phillips*, 324 U.S. at 493; *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989), intended to address labor conditions that Congress found intolerable. See H.R. Rep. No. 93-913 at 8 (quoting President Roosevelt's description of the wage and hour provisions as "the minimum standards of free labor" and his assertion that "goods produced under conditions which do not meet [these] rudimentary standards of decency should be regarded as contraband"). The overarching policy judgment animating FLSA – that those who work full-time should not live in poverty – was central to the 1974 Act:

> Many American workers whose employment is clearly within the reach of this law have never enjoyed its benefits. Unfortunately, these workers are generally in the lowest wage groups and most in need of wage and hour protection. We must extend minimum wage and overtime protection to them.
>
> It is the committee's intention to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as is presently practicable and to raise the minimum wage to a level which will prevent the disgraceful and intolerable situation of workers and their

families dwelling in poverty.

Id. at 9.

Second, the 1974 Amendments (the purported source of the administrative power here) were remedial in a further sense, as part of the broader congressional effort to address problems of race and gender discrimination. As described above, the historical record strongly supports the conclusion that the disfavored treatment of domestic service workers under the FLSA and other contemporaneous welfare and labor statutes was *not* the unintended result of purely race-neutral governmental decision-making. Cf. *Jefferson v. Hackney*, 406 U.S. 535 (1972). Whatever role concerns about potential judicial invalidation played in shaping the law's initial coverage limitations, racial discrimination was very much on Congress's agenda when it passed the FLSA. Southern Senators made clear that they would not abide legislation that "interfered with" the Jim Crow system, *i.e.*, by paying workers equally. See Linder, 65 TEX. L. REV. at 1351, 1374-75 (1987).

The interest in keeping black women in the South in domestic service at low wages was a motivating factor in the drafting and administration of much New Deal social legislation. See, *e.g.*, M. POOLE, THE SEGREGATED ORIGINS OF SOCIAL-SECURITY 38 (2006); SITKOFF, *supra*, at 36. As Southern legislators and their constituents emphasized, relief programs that diminished black women's economic need to work as "servants"; that afforded them alternate employment opportunities; or that held out the possibility of the federal government's acting as guarantor of equal treatment at the local level would not be – and in fact were not – enacted. Katznelson, *et al.*, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 180 POL. SCI. Q. 283, 297 (1993) ("President Roosevelt and congressional leaders tailored New Deal legislation to southern preferences * * * * [S]ponsors fashioned key bills to avoid disturbing the region's racial civilization by employing two main policy instruments: the

exclusion of agricultural and domestic labor, the principal occupational categories of blacks, from legislation * * * and decentralized administration"); see DOMESTICITY AND DIRT, *supra*, at 108-110 (describing National Youth Administration program that trained black girls to be domestic servants). Thus, while President Roosevelt appealed to the "[f]ree labor" ideal inextricably associated with the Thirteenth and Fourteenth Amendments, see H.R. Rep. 93-913 at 8, in calling for the FLSA, the law that resulted fortified a very different system. See generally Linder, 65 TEX. L. REV. at 1372-80.

Although those who championed the 1974 Amendments did not focus on this governmental discrimination, considerations of racial justice and gender equality were a central theme of their argument for covering domestic service employees. These proponents not only viewed the law as ameliorating the economic hardships faced by workers who were "overwhelmingly female and members of minority groups," 119 Cong. Rec. 24,799 (1973) (Sen. Williams), they saw FLSA coverage as an expression of respect for these women's dignity and equality and the importance of the work they performed, and a rejection of the stereotype-laden societal perceptions about such work. Senator Williams, Chair of the Labor Subcommittee and co-sponsor of the 1974 Amendments, recognized that "many who watch our legislative activities view the coverage of domestics as an effort to remedy racial and sexual discrimination," and he situated the provision in broader social and historical context:

> Many domestics are treated just as they were 150 years ago – that is, as slaves. Two-thirds of all household workers are black and of the remaining one-third, many are Chicanos, American Indians, or members of other minority groups. They are called "girl" and by their first names while they, themselves, must still address their employers and their employer's children as "ma'am" or "sir" or "Miss Jane."

Id. See also Shabecoff, "To Domestics, A Minimum Wage is

a Raise," N.Y. Times, June 6, 1973 (quoting Alabama affiliate of the National Committee on Household Employment explaining: "Many employers still tend to maintain the old white superiority-black inferiority relationship in what should be a neutral employer-employee relationship"). As did numerous proponents, Senator Williams explicitly connected the FLSA extension to other federal efforts to promote sex equality: "Now that Congress has sent to the States the constitutional amendment guaranteeing equal rights to women, it would be hypocritical in the extreme to deny an appreciable segment of the female workforce, earning low wages, an opportunity to share in the rewards of the more meaningful employment under the protection of the Fair Labor Standards Act." 119 Cong. Rec. 24,800 (1973).

In the House, Representative Shirley Chisholm led the effort to extend the FLSA to cover domestic workers, mustering evidence to show the predominantly male Congress that domestic workers engaged in difficult labor. See, *e.g.*, Tolchin, *Mrs. Chisholm Led Fight for Domestics' Base Pay*, N.Y. Times, June 21, 1973. And in a letter reproduced in the Committee Report, 17 of the 19 women then serving in Congress, representing both political parties, explained:

> We have heard rumors that your Subcommittee is under pressure to drop the extension of minimum wage coverage to domestic workers. As women legislators, this is of great concern to us.
>
> As you know, women are at the bottom of the economic ladder* * * * * Contrary to popular opinion, women work not for 'pin money' but because they have to. They are either the head of the household or contribute substantially to their family's income* * * *

H.R. Rep. 93-913 at 34.

These proponents repeatedly described their intention that extending FLSA coverage would be a catalyst for change in

societal attitudes toward home-based employment. Given the special significance that the Ninety-third Congress attached to inclusion within the Act – its view of FLSA coverage as an affirmation of the dignity and equality of working minority women, and a recognition of the social and economic importance of domestic work – it would be morally obtuse, as well as legally unjustifiable, to give the usual rule for construing FLSA exemptions less than full force.

III. No Legitimate Policy of the FLSA Is Served By Allowing Commercial Employers To Pay Home Health Care Workers Below-Minimum Wages

Petitioners and their *amici* suggest that even if the Court properly denies § 552.109(a) binding effect, it should sustain it as a "reasonable" interpretation of the statute. Keeping health care worker wages below the federal minimum, they variously contend: (1) advances the affordability of home health care to needy families with modest means; (2) safeguards the public fisc; and (3) benefits workers in respondent's position, by making it less likely that a cost-conscious employer will limit them to 40 weekly hours of work.

Of course, the Labor Department did not allude to any of these rationales when it announced the third-party exemption policy in 1975. The Notice of Final Rulemaking, the agency's first and only contemporaneous explanation of its action, indicated that the Department had been guided by its (mistaken) view of the statutory language, and they did not play any role in Congress's enactment of § 213(a)(15).[14] But these newly imputed regulatory "purposes" not only are unsupported in the legislative and regulatory history, they are in obvious, positive conflict with the specific congressional policy judgments codified in the FLSA and the 1974 Amendments.

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[14]As the decision below recognized, the DOL's "plain language" rationale relied on a casual paraphrase of the congressionally-enacted language – one that did not even remark upon the phrase "domestic service employment" in § 213(a)(15), let alone reckon with its meaning. Pet. App. 32a.

The claim that § 213(a)(15) should be read broadly, so as to expand workers' "freedom" to work more than 40-hour weeks without the employer-deterring overtime pay obligation, see NYC Br. 29, is less an argument *about* the FLSA than an argument *against* the statute. The "danger" that the minimum wage and maximum hours regulations will adversely affect employee earnings is one that has been presented to Congress since the first debates over the FLSA (almost invariably, as here, by employ*ers*, cf. *Tony & Susan Alamo*, 471 U.S. at 302), and it has been rejected for just as long. The congressional findings identify wages below the statutory minimum as "detrimental to the * * * well-being of workers," and, as explained above, the Ninety-third Congress was not agnostic whether being within the Act's coverage was a boon or a bane for employees.[15]

In addition to the argument that workers are better off by being exempted, petitioners and *amici* attempt to derive the right to pay sub-minimum wages from the modest means of (some of) the clients workers care for.[16] As with efforts to assert employees' interests, *amici*'s and petitioners' claims to speak on *clients*' behalf suffer from a series of embarrassments. There is, again, not the slightest indication that DOL adopted the rule for this reason, and those, like *amicus* AARP, who have a direct and un-conflicted interest in improving the quality of home care have weighed in on *employees*' side here, as they did

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[15]Nothing in § 213(a)(15) remotely suggests that Congress believed that casual babysitters and companions were an exception to its general view that workers are better off with statutory coverage. These workers were left unprotected, not because they were seen as better positioned than others to bargain with employers, see 119 Cong. Rec. 24,801 (1973), but because they were not perceived as "bread-winners." H.R. Rep. 93-913 at 36.

[16] Of course, many of those who receive health care at home are well-off in absolute terms; many more, obviously, are better off than the workers whose wages are at stake, who would be guaranteed to $5.15 (and $7.67 for overtime hours) were respondent *to prevail – i.e.*, $10,300 in wages for a year of full-time work. And those who are less well off almost surely qualify for government assistance, see *infra*.

in the court below – and in policy discussions across the country. As their direct experience and intensive research has led them to conclude, low wages pose a far more real threat to client well-being than do "high" – *i.e.*, minimum – wages.[17]

The notion that Congress meant § 213(a)(15) as a health care cost-containment provision is not only at war with the general thrust of FLSA, but belied by the specific legislative policy judgments embodied in the 1974 Act. The first premise of the statute is that the "balance" between workers' earnings and other worthwhile public objectives is not to be struck below the minimum wage, see H.R. Rep. No. 93-913 at 8 ("'A self-supporting and self-respecting democracy can plead * * * no economic reason for chiseling workers' wages or stretching workers' hours'") (quoting President Roosevelt), and, true to that judgment, Congress has broadly covered health care workers, as well as those who work for non-profit and charitable employers. The 1974 Amendments — in addition to raising the minimum wage for health care and other workers – substantially repealed the overtime exemption for nursing home employees (modeled on the extension for State-owned hospitals enacted in 1966, see *Maryland v. Wirtz*, 392 U.S. 183 (1968)). And a Congress intent on using low wages to keep direct care costs down would not likely require households to pay FLSA wages to home *nurses*, see 29 C.F.R. § 552.6 – let alone to companions who spend more than 20 percent of their time on housekeeping, see *id.* § 552.6.

In fact, not even the solitary strand of contemporaneous evidence from which petitioners and *amici* spin out their

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[17]To take one example, while *amici* assert that "continuity of care" would be jeopardized if employers had an incentive to cap workers at 40-hour weeks, there is no indication that this has occurred in States where home health workers are covered by State wage and hour laws, and turnover induced by low wages and poor working conditions is surely a more serious threat to continuity than are the hypothesized caps. See also Occupational Outlook Handbook at 351 (average worker visits five different clients in the course of a work day).

elaborate health policy argument actually supports § 552.109(a). Although the Senate floor debates referenced a letter received from a "single lady employed as a secretary" objecting to coverage of the woman who cared for her aged mother during her work day, 119 Cong. Rec. 24,797 (1973), that complaint was highlighted (by opponents of the *entire* coverage extension) to illustrate the allegedly excessive *administrative* burdens they warned extension would bring. Worse still for petitioners, however, the complaint, involving a companion employed by the household, says literally nothing about whether corporate employers should be made exempt. See *Arnheim & Neely*, 410 U.S. at 519 (rejecting employer's effort to rely on its clients' entitlement to a de facto small-enterprise exception).

Nor, for similar reasons, are the warnings about the adverse effects on public budgets valid *FLSA* arguments. These dire forecasts are surely overdrawn – no small number of home health care workers receive wages that are (as a result of market forces or State and local legislation) in line with what FLSA prescribes. And while the evidence of home-care promotion purpose for the 1974 Act is insubstantial, the evidence of a congressional purpose to spare governments reimbursement costs associated with providers' wage and overtime responsibilities is nonexistent. On the contrary, as landmark decisions of this Court attest, Congress carefully considered, but rejected, States' fiscal – and other – interests when it decided in 1966 and again in 1974 to require State and local agencies (and the federal government) pay *their own* employees minimum wages and overtime pay, in accordance with the FLSA. See *National League of Cities v. Usery*, 426 U.S. 833, 835-39 (1976), *overruled, Garcia*, 469 U.S. at 537-47. As the Court noted, the States were active participants in the legislative process, see *Garcia*, 469 U.S. at 554 n.17, though they had only minor success in retaining any special, favorable treatment. It would be truly capricious to reinterpret § 213(a)(15) as

protecting States from *indirect* costs associated with bringing third-parties' costs in line with minimum federal requirements when the same Congress rejected pleas – grounded in State sovereignty and public safety, as well as fiscal necessity – advanced by governments as direct employers.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

DESCRIPTION OF *AMICI* ORGANIZATIONS

Urban Justice Center

Founded in 1984, the Urban Justice Center is a New York City-based nonprofit organization that serves the City's most vulnerable residents. Through legal representation, advocacy, research and education, the Community Development Project of the Urban Justice Center works with low-income communities, particularly communities of color, to secure the benefits of economic security for all. The Community Development Project advocates on behalf of low-wage workers in New York, including workers engaged in caregiving, and has a substantial interest in ensuring that these workers are entitled to the basic provisions of the federal wage and hour law.

Brennan Center for Justice

The Brennan Center for Justice at New York University School of Law is a non-partisan law and public policy institute dedicated to a vision of effective and inclusive democracy. Through legal representation, research and legislative advocacy, the Brennan Center promotes public policies that enable all residents to participate in the civic and economic life of our nation. For nearly a decade, the Brennan Center has worked at the federal, state and local levels to raise and strengthen the minimum wage for low-income families, particularly caregivers who for too long have been denied many basic protections. Having successfully extended minimum wage laws to include caregivers in some of the states, the Brennan Center has a substantial interest in ensuring that the federal minimum wage law is interpreted correctly to end this outmoded exclusion nationwide.

Asian American Legal Defense and Education Fund

Founded in 1974, the Asian American Legal Defense and Education Fund (AALDEF) is a national organization that protects and promotes the civil rights of Asian Americans. By

combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF advocates on behalf of low-wage Asian American workers to secure fair treatment in the workplace and has an interest in ensuring that our nation's wage and overtime laws protect all low-wage workers.

Mexican American Legal Defense and Educational Fund

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has represented Latino interests in employment discrimination and wage and hour cases throughout the country. MALDEF's mission includes a commitment to pursuing equity and opportunity in the workplace through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

Puerto Rican Legal Defense and Education Fund

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF), based in New York, is a non-profit civil rights impact litigation and advocacy organization that has promoted the civil rights and equal protection of Latinos for the past 34 years through litigation involving constitutional law, federal voting rights, employment and housing discrimination, language rights, educational access, and immigrant rights.

PRLDEF is deeply concerned about the recurring issues that are raised in this case which affect thousands of Latinos, immigrants and other minority employees in the expanding home care industry in the U.S. Many of these domestic workers are disproportionately impacted by substandard and unfair working conditions and face wage inequities under the existing laws.

National Women's Law Center

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the promotion of economic security for women and their families. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement and strengthening of anti-discrimination laws and other laws promoting workplace fairness, and has represented petitioners and prepared or participated in numerous *amicus* briefs before this Court and the federal courts of appeal.

National Partnership for Women & Families

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

Legal Momentum

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. With the goal of promoting economic security for women, Legal Momentum has litigated cases to address interpretations of federal employment protections that particularly disadvantage women workers, including *United States and Colon v. City of New York*, 359 F.3d 83 (2d Cir. 2004), and has participated as *amicus curiae* in leading cases addressing sex discrimination in the workplace, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). This case is of particular interest to Legal Momentum because home care workers are nearly all female, and because the original exemption of domestic workers from the Fair Labor Standards Act was based on stereotypes that demean the value of domestic work and women workers.

Washington Lawyers' Committee for Civil Rights and Urban Affairs

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, a non-profit, public interest organization, seeks to eradicate discrimination and fully enforce the nation's civil rights laws through the provision of legal assistance. The Committee was formed in 1968 in response to both a national report issued by the National Advisory Commission on Civil Disorders identifying discrimination and poverty as the root causes of the recent social unrest, and a related call from members of the private bar to mobilize to meet the legal needs of underserved populations. In the Committee's almost 40-year history, its attorneys have represented thousands of individuals who have alleged discrimination in cases brought under both federal civil rights statutes and state and local civil rights laws, as well as individuals who have alleged violations of federal and state fair labor laws. The largest and oldest of the Committee's projects is the Equal Employment Opportunity Project, which represents victims of employment discrimination and wage and hour violations in individual cases and class actions against both government agencies and private employers. From these and other cases, the Washington Lawyers' Committee has developed expertise in the issues of law and public policy that have been raised in the present matter.

American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this

nation's civil rights laws. Through its Women's Rights Project and Racial Justice Program, the ACLU has worked for decades to eliminate the barriers to full equality for women and communities of color. As documented in this brief, the challenged exclusion of caregivers from minimum wage protection has a disproportionate impact on women of color and reflects an historical undervaluing of work traditionally associated with women. The proper resolution of this case is therefore a matter of substantial interest to the ACLU and its members.

SUPREME COURT OF THE UNITED STATES

LOS ANGELES COUNTY, CALIFORNIA, ET AL. *v.*
MAX RETTELE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–605. Decided May 21, 2007

PER CURIAM.

Deputies of the Los Angeles County Sheriff's Department obtained a valid warrant to search a house, but they were unaware that the suspects being sought had moved out three months earlier. When the deputies searched the house, they found in a bedroom two residents who were of a different race than the suspects. The deputies ordered these innocent residents, who had been sleeping unclothed, out of bed. The deputies required them to stand for a few minutes before allowing them to dress.

The residents brought suit under Rev. Stat. §1979, 42 U. S. C. §1983, naming the deputies and other parties and accusing them of violating the Fourth Amendment right to be free from unreasonable searches and seizures. The District Court granted summary judgment to all named defendants. The Court of Appeals for the Ninth Circuit reversed, concluding both that the deputies violated the Fourth Amendment and that they were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents were of a different race than the suspects and because a reasonable deputy would not have ordered respondents from their bed. We grant the petition for certiorari and reverse the judgment of the Court of Appeals by this summary disposition.

I

From September to December 2001, Los Angeles County

Sheriff's Department Deputy Dennis Watters investigated a fraud and identity-theft crime ring. There were four suspects of the investigation. One had registered a 9-millimeter Glock handgun. The four suspects were known to be African-Americans.

On December 11, Watters obtained a search warrant for two houses in Lancaster, California, where he believed he could find the suspects. The warrant authorized him to search the homes and three of the suspects for documents and computer files. In support of the search warrant an affidavit cited various sources showing the suspects resided at respondents' home. The sources included Department of Motor Vehicles reports, mailing address listings, an outstanding warrant, and an Internet telephone directory. In this Court respondents do not dispute the validity of the warrant or the means by which it was obtained.

What Watters did not know was that one of the houses (the first to be searched) had been sold in September to a Max Rettele. He had purchased the home and moved into it three months earlier with his girlfriend Judy Sadler and Sadler's 17-year-old son Chase Hall. All three, respondents here, are Caucasians.

On the morning of December 19, Watters briefed six other deputies in preparation for the search of the houses. Watters informed them they would be searching for three African-American suspects, one of whom owned a registered handgun. The possibility a suspect would be armed caused the deputies concern for their own safety. Watters had not obtained special permission for a night search, so he could not execute the warrant until 7 a.m. See Cal. Penal Code Ann. §1533 (West 2000). Around 7:15 Watters and six other deputies knocked on the door and announced their presence. Chase Hall answered. The deputies entered the house after ordering Hall to lie face down on the ground.

The deputies' announcement awoke Rettele and Sadler. The deputies entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands. They protested that they were not wearing clothes. Rettele stood up and attempted to put on a pair of sweatpants, but deputies told him not to move. Sadler also stood up and attempted, without success, to cover herself with a sheet. Rettele and Sadler were held at gunpoint for one to two minutes before Rettele was allowed to retrieve a robe for Sadler. He was then permitted to dress. Rettele and Sadler left the bedroom within three to four minutes to sit on the couch in the living room.

By that time the deputies realized they had made a mistake. They apologized to Rettele and Sadler, thanked them for not becoming upset, and left within five minutes. They proceeded to the other house the warrant authorized them to search, where they found three suspects. Those suspects were arrested and convicted.

Rettele and Sadler, individually and as guardians ad litem for Hall, filed this §1983 suit against Los Angeles County, the Los Angeles County Sheriff's Department, Deputy Watters, and other members of the sheriff's department. Respondents alleged petitioners violated their Fourth Amendment rights by obtaining a warrant in reckless fashion and conducting an unreasonable search and detention. The District Court held that the warrant was obtained by proper procedures and the search was reasonable. It concluded in the alternative that any Fourth Amendment rights the deputies violated were not clearly established and that, as a result, the deputies were entitled to qualified immunity.

On appeal respondents did not challenge the validity of the warrant; they did argue that the deputies had conducted the search in an unreasonable manner. A divided panel of the Court of Appeals for the Ninth Circuit reversed in an unpublished opinion. 186 Fed. Appx. 765

(2006). The majority held that

> "because (1) no African-Americans lived in [respondents'] home; (2) [respondents], a Caucasian couple, purchased the residence several months before the search and the deputies did not conduct an ownership inquiry; (3) the African-American suspects were not accused of a crime that required an emergency search; and (4) [respondents] were ordered out of bed naked and held at gunpoint while the deputies searched their bedroom for the suspects and a gun, we find that a reasonable jury could conclude that the search and detention were 'unnecessarily painful, degrading, or prolonged,' and involved 'an undue invasion of privacy,' *Franklin v. Foxworth*, 31 F. 3d 873, 876 (9th Cir. 1994)." *Id.*, at 766.

Turning to whether respondents' Fourth Amendment rights were clearly established, the majority held that a reasonable deputy should have known the search and detention were unlawful.

Judge Cowen dissented. In his view the deputies had authority to detain respondents for the duration of the search and were justified in ordering respondents from their bed because weapons could have been concealed under the bedcovers. He also concluded that, assuming a constitutional violation, the law was not clearly established.

The Court of Appeals denied rehearing and rehearing en banc.

II

Because respondents were of a different race than the suspects the deputies were seeking, the Court of Appeals held that "[a]fter taking one look at [respondents], the deputies should have realized that [respondents] were not the subjects of the search warrant and did not pose a threat to the deputies' safety." *Ibid.* We need not pause

long in rejecting this unsound proposition. When the deputies ordered respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house. The presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well. As the deputies stated in their affidavits, it is not uncommon in our society for people of different races to live together. Just as people of different races live and work together, so too might they engage in joint criminal activity. The deputies, who were searching a house where they believed a suspect might be armed, possessed authority to secure the premises before deciding whether to continue with the search.

In *Michigan* v. *Summers*, 452 U. S. 692 (1981), this Court held that officers executing a search warrant for contraband may "detain the occupants of the premises while a proper search is conducted." *Id.*, at 705. In weighing whether the search in *Summers* was reasonable the Court first found that "detention represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant." *Id.*, at 703. Against that interest, it balanced "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search." *Id.*, at 702–703; see *Muehler* v. *Mena*, 544 U. S. 93 (2005).

In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. *Id.*, at 98–100; see also *id.*, at 103 (KENNEDY, J., concurring); *Summers*, *supra*, at 704–705. The test of reasonableness under the Fourth Amendment is an objective one. *Graham* v. *Connor*, 490 U. S. 386, 397 (1989) (addressing the reasonableness of a seizure of the person). Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and

unnecessary period of time. *Mena*, *supra*, at 100; *Graham*, *supra*, at 396–399.

The orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies. Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. The reports are replete with accounts of suspects sleeping close to weapons. See *United States* v. *Enslin*, 327 F. 3d 788, 791 (CA9 2003) ("When [the suspect] put his hands in the air and began to sit up, his movement shifted the covers and the marshals could see a gun in the bed next to him"); see also *United States* v. *Jones*, 336 F. 3d 245, 248 (CA3 2003) (suspect kept a 9-millimeter Luger under his pillow while he slept); *United States* v. *Hightower*, 96 F. 3d 211 (CA7 1996) (suspect kept a loaded five-shot handgun under his pillow); *State* v. *Willis*, 36,759–KA, p. 3 (La. App. 4/9/03), 843 So. 2d 592, 595 (officers "pulled back the bed covers and found a .38 caliber Model 10 Smith and Wesson revolver located near where defendant's left hand had been"); *State* v. *Kypreos*, 115 Wash. App. 207, 61 P. 3d 352 (2002) (suspect kept a handgun in the bed).

The deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger. Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets. Rather, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Summers*, 452 U. S., at 702–703.

This is not to say, of course, that the deputies were free to force Rettele and Sadler to remain motionless and standing for any longer than necessary. We have recog-

nized that "special circumstances, or possibly a prolonged detention" might render a search unreasonable. See *id.*, at 705, n. 21. There is no accusation that the detention here was prolonged. The deputies left the home less than 15 minutes after arriving. The detention was shorter and less restrictive than the 2- to 3-hour handcuff detention upheld in *Mena*. See 544 U. S., at 100. And there is no allegation that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety. Sadler was unclothed for no more than two minutes, and Rettele for only slightly more time than that. Sadler testified that once the police were satisfied that no immediate threat was presented, "they wanted us to get dressed and they were pressing us really fast to hurry up and get some clothes on." Deposition of Judy Lorraine Sadler in No. CV–0206262–RSWL (RNBX) (CD Cal., June 10, 2003), Doc. 26, Exh. 4, p. 55.

The Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty. Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the resulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

As respondents' constitutional rights were not violated, "there is no necessity for further inquiries concerning qualified immunity." *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER would deny the petition for a writ of certiorari.

SUPREME COURT OF THE UNITED STATES

LOS ANGELES COUNTY, CALIFORNIA, ET AL. *v.* MAX RETTELE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–605. Decided May 21, 2007

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring in the judgment.

This case presents two separate questions: (1) whether the four circumstances identified in the Court of Appeals' unpublished opinion established a genuine issue of material fact as to whether the seizure violated respondents' Fourth Amendment rights, see *ante,* at 4; (2) whether the officers were nevertheless entitled to qualified immunity because the right was not clearly established. The fact that the judges on the Court of Appeals disagreed on both questions convinces me that they should not have announced their decision in an unpublished opinion.

In answering the first question, the Ninth Circuit majority relied primarily on *Franklin* v. *Foxworth*, 31 F. 3d 873 (CA9 1994). As Judge Cowen's discussion of *Franklin* demonstrates, that case surely does not clearly establish the unconstitutionality of the officers' conduct.* Conse-

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*See 186 Fed. Appx. 765, 767 (2006) (dissenting opinion) ("In *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994), we found unconstitutional the officers' failure to provide clothing to a gravely ill man before exposing his genitals to twenty-three strangers for over two hours, under circumstances where there was no reason why the man was not given clothing. *Id.* at 876–78. We concluded that the 'detention was conducted in 'a manner that wantonly and callously subjected an obviously ill and incapacitated person to entirely unnecessary and unjustifiable degradation and suffering.' *Id.* at 878. Here, in contrast, Plaintiffs were not gravely ill, and their brief exposure, which lasted, at most, three or four minutes, was outweighed by the safety risks associated with allowing two occupants to remain in bed under covers during

quently, regardless of the proper answer to the constitutional question, the defendants were entitled to qualified immunity. I would reverse on that ground and disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 859 (1998) (STEVENS, J., concurring in judgment). Accordingly, I concur in the Court's judgment.

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execution of a search warrant").